Supreme Court U.S.
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No. _____

In The
Supreme Court of the United States

SANDRA KUCERA, SARAH THERESE WINDER, KRISTIN ZUBEL, NATALIE BOLTON, PHILLIP SALISBURY, SAMANTHA BERG, TIMOTHY JOHNSON and GREGORY KAFOURY,

Petitioners,

v.

BILL BRADBURY, Secretary of State, DEMOCRATIC PARTY OF OREGON, JOHN NEEL PENDER and JAMES EDMUNSON,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Oregon

PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF LEGAL QUESTIONS PRESENTED ON REVIEW

1. Are the free speech or association, due process or equal protection rights, under the United States Constitution, of independent candidates for federal office violated, if state statutes (as interpreted by the highest court of the state) allow a state officer (Secretary of State) to disqualify voter signatures on nominating petitions for reasons that are not stated in any statute or in any published administrative rule or any other means of communication available to the candidates or their signature gatherers?

   A. May the state officer thus disqualify all voter signatures on a signature sheet, even after each voter signature has been verified as valid by affidavit of county officials:

      (1) Merely because the signature of the petition *circulator* is "illegible" or "appears to be initials," even though no published rules prohibit such circulator signatures?

      (2) Merely because the petition circulator attempted to correct any type of error or slip of the pen in affixing a date on her own signature on the petition?

   B. May the state officer thus permanently disqualify all county-verified valid voter signatures on a signature sheet, without providing (1) any notice to the petition circulator or to the candidate or his campaign that the sheet is being rejected, or (2) any reason for the rejection of any signature sheet, or (3) any opportunity for the petition circulator to cure the alleged defect by affidavit or otherwise?

STATEMENT OF LEGAL QUESTIONS PRESENTED ON REVIEW – Continued

C. May the state officer thus permanently disqualify all county-verified valid voter signatures on a signature sheet, with no notice or opportunity to cure, if the date on the petition circulator's signature is anything other than a one-time pristine flow of ink on paper, with no corrections whatever?

D. May the state officer discriminate against petition circulators who are not Oregon-registered voters by resurrecting some signature sheets on the basis of the voter registration card signatures on file only for those petition circulators who are Oregon-registered voters?

E. Do the above procedures not violate constitutional rights, if the state officer, after the signature gathering effort is well underway, sends an unpublished memorandum to county officials, calling upon them to apply the above-mentioned unpublished rules, when the memorandum is not adopted as a rule and is not disclosed to the public, to the candidate's campaign, or to the petition circulators?

F. May the state officer permanently disqualify voter signatures on all signature sheets submitted to county officials without sequential sheet numbering, when such requirement has never previously been enforced or was in fact waived by the responsible state officer?

2. Do any of these same circumstances violate the free speech or association, due process or equal protection rights of the candidates, where the state has not (1) articulated a compelling or important state interest for these procedures or (2) shown that its scheme is

STATEMENT OF LEGAL QUESTIONS PRESENTED ON REVIEW – Continued

narrowly tailored or even rationally related to such an interest, if it were to exist, for:

A. Discarding all signature sheets which do not conform to the state officer's unpublished "rules"; or

B. Discarding all signature sheets not sequentially numbered when submitted to county officials.

3. Do any of these same circumstances violate the free speech or association, due process or equal protection rights of (1) the petition circulators or (2) qualified voters who signed their valid and county-verified signatures on the later-discarded petition sheets?

4. Do any of these same circumstances violate the free speech or association, due process or equal protection rights of qualified voters who wish to cast votes for the independent candidates for federal office, particularly where state law does not allow write-in votes for such a candidate to be counted except in the extraordinary circumstance where the total write-in vote exceeds the vote for any candidate listed on the ballot?

PARTIES TO THE PROCEEDING

All parties to the proceeding are named in the caption. Petitioners for Certiorari are individuals only and not corporations.

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CITATIONS TO REPORTS OF OPINIONS

The decision of the Oregon Supreme Court is *Kucera v. Bradbury*, 337 Or. 384, 97 P.3d 1191 (2004).

This Court's denial of the Application for Stay of Oregon Supreme Court Order, Pending Certiorari Review is *Kucera v. Bradbury*, 125 S.Ct. 27, 159 L.Ed.2d 855, 73 USLW 3204 (U.S. Sep. 28, 2004) (NO. 04A242).

BASIS FOR JURISDICTION

On September 22, 2004, The Oregon Supreme Court issued a Peremptory Writ of Mandamus, ordering the Marion County Circuit Court to vacate its order of September 9, 2004, ordering the Oregon Secretary of State to place the Nader/Kucera ticket on the Oregon ballot for President and Vice President of the United States. On September 23, 2004, the Oregon Supreme Court denied Plaintiffs' Petition for Stay and Reconsideration, thus ending all review of the matter by the courts of Oregon.

This Court has jurisdiction to hear this Writ of Certiorari under 28 U.S.C. § 1257(a). The Oregon statutes pertaining to verification of signatures on nominating petitions, as applied and interpreted by a final judgment of the Oregon Supreme Court, are repugnant to First, Fifth, and Fourteenth Amendments to the United States Constitution.

CONSTITUTIONAL PROVISIONS, STATUTES, REGULATIONS INVOLVED IN THE CASE

A. CONSTITUTIONAL PROVISIONS.

Plaintiffs (Petitioners herein) were deprived of their rights under the First and Fifth Amendments of the U.S. Constitution, made applicable to the states by the Fourteenth Amendment.

Article I.

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech,

> or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.
>
> Article V.
>
> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

B. STATUTES.

ORS 249.740 and ORS 249.008 are set forth in the Appendix.

2004 STATE CANDIDATE'S MANUAL: INDIVIDUAL ELECTORS [hereinafter the "MANUAL"] is a 19-page rule adopted by the Oregon Secretary of State to implement these statutes. The MANUAL states (p. 13):

> The circulator of the candidate nominating petition must sign the circulator's certification, stating that:
>
> > "I hereby certify every person who signed this sheet did so in my presence and I believe each person is a qualified voter of the state of Oregon."
>
> The circulator shall complete the date when the certification is signed and shall not collect any additional signatures on that sheet after dating the certification.

STATEMENT OF FACTS

A. PROCEDURAL HISTORY OF THE CASE.

On September 2, 2004, the Oregon Secretary of State Bill Bradbury [hereinafter "Defendant" and Respondent herein] refused to certify the nomination of Ralph Nader to appear on the November 2, 2004, Oregon ballot as an independent candidate for President of the United States, although his supporters had submitted more that the number of signatures required. On September 3, 2004, Plaintiffs filed suit in Marion County Circuit Court for an order requiring Defendant to certify Nader's place on the ballot.[1] This suit included the federal questions sought to be reviewed, including three specific claims under the U.S. Constitution (the First, Fifth, and Seventh Claims for Relief).

On September 9, after a day of hearing with live witnesses, the presiding judge of the Marion County Circuit Court issued an Opinion and Order (set forth in the Appendix), which ruled for Plaintiffs on their Fourth Claim (based on Oregon statutes) and found such ruling to be "dispositive of the merits without reaching constitutional claims." The Court found that Nader had qualified for the ballot and ordered the Secretary of State to "order the preparation of ballots for President and Vice-President for the 2004 General Election which contain the names of Ralph Nader and Sandra Kucera as independent candidates for President and Vice-President." General Judgment, ER-115.[2]

On September 22, the Oregon Supreme Court issued a Peremptory Writ of Mandamus, ordering the Marion County Circuit Court to vacate its order of September 9. The court's opinion addressed all of the federal constitutional issues

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[1] Unless otherwise stated, all date references are to dates in 2004.

[2] ER refers to the Excerpts of Record filed with the Oregon Supreme Court and transmitted to this Court with the Application for Stay of Oregon Supreme Court Order, Pending Certiorari Review, which was filed September 24, 2004. SER refers to the Supplemental Excerpts of Record, similarly filed.

raised by Plaintiffs in less than two pages: *Kucera v. Bradbury*, 337 Or. 384, 97 P.3d 1191, 1204 (2004) (App. 30). On September 23, the Oregon Supreme Court summarily denied Plaintiffs' Petition for Stay and Reconsideration, thus ending all review of the matter by the courts of Oregon.

While the Oregon 2004 ballot did not include the Nader/Kucera ticket, this matter is within this Court's jurisdiction as capable of repetition yet evading review. *Norman v. Reed*, 502 U.S. 279, 287-88, 112 S.Ct. 698, 116 L.Ed.2d 711 (1992); *Anderson v. Celebrezze*, 460 U.S. 780, 784, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983), stated: *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 187, 99 S.Ct. 983, 59 L.Ed.2d 230 (1979); *Weinstein v. Bradford*, 423 U.S. 147, 149, 96 S.Ct. 347, 46 L.Ed.2d 350 (1975) (per curiam); *Dunn v. Blumstein*, 405 U.S. 330, 333 n. 2, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972); *Moore v. Ogilvie*, 394 U.S. 814, 816, 89 S.Ct. 1493, 23 L.Ed.2d 1 (1969); *Storer v. Brown*, 415 U.S. 724, 737, 94 S.Ct. 1274, 39 L.Ed.2d 714 (1974). Without review by this Court, future candidates for federal office, including Nader if he runs again, will be subject to the same unconstitutional treatment as was afforded the Nader/Kucera ticket here.

B. UNDERLYING FACTS OF THE CASE.

In August 2004, supporters of the Nader/Kucera ticket ("Nader Campaign") filed thousands of signature sheets with the county election officers ("counties") charged with verifying the voter signatures and returning the originals of the signature sheets to the Campaign (with their affidavits affixed to each sheet). The Campaign then submitted the verified original sheets to the Defendant by the August 24 filing deadline for placement on the November ballot.

Of the sheets containing over 27,000 signatures submitted to the counties, the counties returned to the Nader Campaign signature sheets with 18,186 voter signatures individually found to be valid. Every signature sheet is also an affidavit of the county elections officer,

who signs every sheet after specifying the number of valid, verified voter signatures on that sheet.[3]

During the county-level verification process, the Defendant sent an informal ("Hi Everyone") memo, to the county elections officers (dated August 4[4]), with instructions on how to handle the Nader petitions. Excerpt of Record submitted (by Defendant) to the Oregon Supreme Court [hereinafter "ER"] ER-92 *et seq*. We shall refer to this memo as the "Unpublished Instructions." These were not provided to the Nader Campaign or to the public but were internal memoranda of the State of Oregon.

The Unpublished Instructions directed the counties to remove sheets, and not verify the voter ("elector") signatures thereon, if the signature of the circulator did not meet the criteria listed in the Unpublished Instructions.[5] The counties then removed hundreds of signature sheets from the verification process and did not return those sheets to the Nader Campaign.[6] The instructions most

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[3] Each signature sheet is a sworn, dated affidavit by a county elections officer, that the specified number of voter signatures on the sheet are valid. ORS 249.008(1).

[4] We note that the "Hi Everyone" memo itself [ER-93-94] is undated and is in Times Roman typeface. The cover email for it is in Arial typeface and was unknown to Plaintiffs prior to the date of trial.

[5] Defendant later admitted, in a memorandum to the Oregon Supreme Court, that addressing the validity of the circulator's signature was beyond the authority of the counties. Defendant's Mandamus Memorandum to the Oregon Supreme Court (p. 6) stated:

> Notably, the matters examined by county officials is extremely limited: They simply "compare the signatures of electors on the petition or minutes with the signatures of the electors or the elector registration cards." ORS 249.006 [sic; should be 249.008]. The certification states the number of signatures believed to be genuine.

[6] The Unpublished Instructions direct the counties to "not return any signature sheets to the Nader Campaign that may have potential problems until the Secretary of State has resolved these issues and notified the county." The counties are instructed to return to the Nader Campaign only "the original sheets with the counties certification," which means those sheets that were not rejected for "potential problems

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harmful to the Nader Campaign were those to reject entire sheets, if:

> (1) "Circulator signature has signed using initials only."
>
> (2) "Circulator date has been crossed out or modified."

The Unpublished Instructions required rejection of entire sheets, if the circulator's signature "appeared to be initials," even if that was the circulator's normal way of signing. This was not a question of identifying the circulator, because every signature sheet contained the printed name of the circulator under her signature. There are no Oregon statutes or rules pertaining to candidate petitions requiring that circulator signatures must not consist of initials.

Nor are there Oregon statutes or rules requiring that every date applied to a circulator's signature be a pristine flow of ink on paper, with no corrections. The Unpublished Instructions directed the counties to disqualify entire sheets of voter signatures, if the circulator had made any slip of the pen in writing the date on her own signature (such as beginning to write a "7" for July and, realizing the month had changed, crossing it out and replacing it with an "8" for August).

Neither the Defendant nor the counties notified the Nader Campaign that the sheets signed by any circulator were being rejected during the county-level verification process. Thus, there was no opportunity for the Campaign to contest those rejections by, for example, producing the circulator in person or by affidavit with signature exemplars (on a driver's license, passport, W-4 form, etc.) to show that the rejected circulator signature was indeed a signature of that circulator. Nor was there any means to "uncorrect" any corrected date on a circulator signature.

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with circulator signature and dating of signature of sheets." In practice, as indicated in the Affidavit of Travis Diskin (SER-29), the counties did not return the rejected sheets to the Nader Campaign, until after the August 24 deadline for filing the sheets with the Secretary of State.

The counties returned the rest of the verified signature sheets to the Nader Campaign, complete with their own affidavits attesting to the number of valid signatures on each sheet, which the Nader Campaign submitted to Defendant on August 24. Defendant announced that the number of valid, verified signatures submitted was 18,186, which was 2,880 more than the needed number. Suddenly, on September 1, Defendant called a press conference (where the representative of the Nader Campaign was physically excluded from the room) and announced that Nader had fallen 218 signatures short, because Defendant had himself rejected additional sheets containing over 3,000 verified voter signatures. **Despite repeated requests, Defendant provided no documents to the Nader Campaign stating why any rejected signature sheet was rejected.**

On September 2, the Nader Campaign received a 1-page telecopied letter from Defendant, stating that the number of valid signatures counted by the Secretary of State was 15,088 (Exhibit A to the Appeal/Petition), which is 218 fewer than the 15,306 required. Just prior to trial, Plaintiffs received a half-page summary of sheets that were rejected by the Defendant because they had not been sequentially numbered by the Nader Campaign prior to submittal to the counties. Those Defendant-rejected sheets contained 2,354 verified voter signatures. The half-page summary also noted "other rejections" by Defendant of sheets containing 718 verified voter signatures. Plaintiffs read in the press that these signatures were contained on sheets which Defendant had rejected for some perceived deficiency in the circulator's signature or the date accompanying the circulator's signature. Defendant did not identify any reason for rejecting any individual sheet, apart from the lack of sequential numbering.

Defendant provided no notice or opportunity for the Nader Campaign (or anyone else) to cure the alleged problems with the signature sheets. Instead, on the basis his application of unwritten rules, Defendant merely declared that Nader had not qualified for the ballot.

ARGUMENT FOR ALLOWANCE OF THE WRIT

Allowance of the writ is warranted under SCR 10(c), as the Oregon Supreme Court has decided important federal constitutional questions in a way that conflicts with relevant decisions of this Court.

Plaintiffs' Fifth and Seventh Claims (ER-14-16) sought relief for violations of Plaintiffs' rights under the First, Fifth, and Fourteenth Amendments of the U.S. Constitution. The trial court did not reach these claims, having granted the relief sought on the basis of one of Plaintiffs' statutory claims. The Oregon Supreme Court addressed the Fifth and Seventh Claims and summarily denied them. *Kucera v. Bradbury*, 337 Or. 384, 97 P.3d 1191, 1204 (2004) (App. 30).

I. BY IMPOSING UNWRITTEN RULES TO REJECT SIGNATURE SHEETS, DEFENDANT VIOLATED THE RIGHTS OF PLAINTIFFS UNDER THE FIRST AND FIFTH AMENDMENTS TO NOMINATE A CANDIDATE PURSUANT TO THE APPLICABLE PUBLISHED ELECTION STATUTES AND RULES.

Defendant rejected, by means of his "unwritten rules," far more than enough verified voter signatures (at least 718) than the shortfall of 218 signatures. The Oregon Supreme Court concluded that application of the "unwritten rules" did not violate Oregon law. Plaintiffs contend that the application of "unwritten rules" did violate their rights under the U.S. Constitution by depriving them of a recognized liberty interest with no notice and no opportunity to cure the alleged "circulator errors" on the signature sheets.

A. DEFENDANT REJECTED SIGNATURE SHEETS ON THE BASIS OF HIS UNWRITTEN RULES.

The trial court found that the Nader/Kucera ticket was denied ballot access by Defendant's creation and

application of unwritten rules which rejected sheets containing at least 718 valid and verified voter signatures. These are in addition to the unknown number of voter signatures on sheets that were rejected and then retained by the counties, at the direction of Defendant, due to Defendant's perception of alleged "errors" by the circulators.

The Oregon Supreme Court did not disagree:

> The trial court determined that the signature and date review procedures that Lindback had followed in his office were "unwritten rules," that they were "not supported by the written administrative rules as set forth in the Manual," that they were "inconsistent with ORS 247.005" and "the prior policy of the Elections Division" as stated in *Nelson*, and that they "were not applied either uniformly or consistently in actual practice."
>
> **It is true that the review procedures that** [Defendant's director of elections] **Lindback described were not themselves written, but that does not render them unlawful.**

97 P.3d at 1200 (App. 21) (emphasis added). Thus, the Oregon Supreme Court recognized that Defendant used unwritten rules to disqualify the sheets.

1. SHEETS WITH NO DISCERNIBLE DATING ERRORS.

Defendant rejected sheets containing several hundred signatures, which have no conceivable errors or corrections to the date on the circulator's signature. The trial proceeded on Plaintiffs' uncontested assumption that the sheets were rejected solely because Defendant did not like the appearance of the circulator's signature.

The Affidavit of Travis Diskin (SER-28) attached as exhibits hundreds of rejected signature sheets. Defendant provided no ruling and no rationale for rejection of any of these circulator signatures. Various Plaintiffs and other

circulators provided affidavits confirming the validity of their signatures as circulators.[7]

The state's largest county, Multnomah, at instruction of Defendant, disqualified hundreds of signature sheets on this basis. Had Plaintiffs been notified that circulator signatures were somehow "questionable," they would have provided to the county elections officer the circulator himself or his (or her) signature exemplars during the county verification period. Plaintiffs do not know whether other counties also "pulled" and did not verify sheets at the direction of Defendant, who never answered Plaintiffs' timely request for production on this subject.[8]

The trial court concluded that the marks by the rejected circulators qualified as "signatures" and therefore met the requirements of Defendant's published rules for nominating petitions, which are contained in the 2004 STATE CANDIDATE'S MANUAL: INDIVIDUAL ELECTORS [ER-71 *et seq.*] [hereinafter the "MANUAL"].[9] The only requirement

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[7] All affidavits filed by Plaintiffs in trial court were not contested by Defendant.

[8] Defendant has never responded to Plaintiffs' attempts to obtain documents showing why each sheet was rejected. Prior to the trial court hearing, Plaintiffs requested production of:

> 4. All documents demonstrating the reason why each Nader/ Kucera nominating petition signature sheet rejected by the Secretary of State was rejected.

Prior to trial court judgment, Plaintiffs requested production of:

> 8. All other documents indicating why each Nader nomination signature sheet rejected by Defendant was rejected.
>
> 9. A complete listing of all Nader nomination signature sheets in every county that were not verified by the county elections officers due to circulator "issues," as stated by John Lindback at the court hearing on September 8, 2004, the reason why each sheet was not verified, and who directed that the sheet not be verified (Secretary of State or local decision of county elections officer).

[9] That MANUAL declares itself to be a "comprehensive overview of the candidate filing process" and to provide "the procedures and regulations necessary to file for office." ER-76. It was reasonable for the

(Continued on following page)

pertaining to circulator signatures in the MANUAL [ER-86] is this:

> The circulator of the candidate nominating petition must sign the circulator's certification, stating that:
>
> > "I hereby certify every person who signed this sheet did so in my presence and I believe each person is a qualified voter of the state of Oregon."
>
> The circulator shall complete the date when the certification is signed and shall not collect any additional signatures on that sheet after dating the certification.

BLACK'S LAW DICTIONARY (8th ed. 2004) defines "signature" as:

> 1. A person's name or mark written by that person or at the person's direction. [citations omitted]

The marks made by the rejected circulators listed above certainly qualify as "signatures," even without their affidavits of authenticity. These affidavits were provided as soon as Defendant provided any notice to the Nader Campaign that there was any problem with these signature sheets at all.[10]

2. TRIVIAL DATE CORRECTIONS WHERE THE INTENTION OF THE CIRCULATOR IS MANIFESTLY CLEAR.

Defendant also rejected sheets due to the way the circulator dated his or her signature or corrected such

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Nader Campaign to rely upon this "comprehensive" MANUAL. The full document is available at http://www.sos.state.or.us/elections/manuals/indiv.pdf. The Oregon Supreme Court opinion refers to it as the SCMIE.

[10] References to the hearing video record are to the timestamps embedded in it. Plaintiffs furnished the full DVD of the trial court hearing to this Court with their Application for Stay pending Petition for Certiorari.

date. The Affidavit of Travis Diskin. Ex. E and Ex. K, presented a bundle of signature sheets for which Plaintiffs were never given a reason for rejection or notice or opportunity to cure. Plaintiffs discerned no reason for rejection, other than the appearance of the date or the attempt by the circulator to correct the date next to his or her signature.

The trial court concluded that the MANUAL contains only one applicable dating requirement:

> The circulator shall complete the date when the certification is signed and shall not collect any additional signatures on that sheet after dating the certification.

Id., p. 13. The rejected signature sheets complied with this dating requirement.

There is no requirement in any statute or rule that all dates on circulator signatures be pristine. There is no published rule against dates that are corrected.

3. THE TRIAL COURT'S DECISION CONCLUDED THAT DEFENDANT APPLIED "UNWRITTEN RULES" TO DISQUALIFY THE NADER PETITIONS.

The trial court concluded that Defendant had violated Oregon statutes and his own rules in rejecting these signatures. ER-107 *et seq*. The Oregon Supreme Court ruled otherwise but did not contradict the trial court's findings that Defendant rejected the signature sheets pursuant to "unwritten rules" that were not available to Plaintiffs.

The trial court concluded (App. 38-39):

> These unwritten rules, however longstanding, are not supported by the written administrative rules as set forth in the Manual, and they are inconsistent with ORS 247.005, as well as with the prior policy of the Elections Division as set forth above. Additionally, it was obvious from

> the testimony of Mr. Lindback that the Secretary's unwritten rules were not applied either uniformly or consistently in actual practice.

The trial court (App. 40) also concluded that Defendant acted contrary to statute and his written rules in instructing counties to remove sheets from the verification process, based upon alleged "circulator problems."

> However, these instructions are inconsistent with both the state elections policy established by the Legislature in ORS 247.005, and with the Secretary's own written rules as set forth in the MANUAL, as well as with the Secretary's policy position set forth in *Nelson v. Keisling*.

Defendant then excluded yet more hundreds of sheets for alleged "circulator problems," after those sheets had been verified by the counties and delivered to Defendant on August 24. The court found "no statutory or administrative rule authority for that novel action by the Secretary at the post-verification stage."

The court (App. 41) concluded (emphasis added):

> It is not disputed by the Secretary that if the elector signature sheets that had been verified by county clerks and certified to the Secretary had not been disallowed by the Secretary, the Nader campaign would have had more than enough "Verified signature sheets with the sufficient number of signatures," as required by the administrative rules as set forth in the Manual. And many more additional signature petitions were never even processed for verification at the counties because of the Secretary's instructions in August, 2004 to scrutinize for circulator certification "issues" before verifying elector signatures on the Nader nominating petitions. **Neither action was authorized by administrative rule or statute, and each was inconsistent with both the state elections policy as established by the Legislature, ORS 247.005, and**

with the prior policy of the Secretary of State as expressed *Nelson v. Keisling, supra.*

But the Oregon Supreme Court held that Defendant could disqualify the sheets pursuant to unwritten and undisclosed "rules," never adopted as rules by Defendant.

4. THE UNWRITTEN RULES WERE NOT ADOPTED BY ANY RULE MAKING PROCEDURE.

Some of the "unwritten rules" were contained in the Unpublished Instructions (dated August 4). Others were not written anywhere. For example, at trial it was established that Defendant had rejected sheets because the circulator's signature was not "legible." That requirement is not written.

The Oregon Supreme Court concluded that Defendant was only "interpreting" his rules. Under this approach, Defendant could reject all signatures on a sheet, using an "unwritten rule" that the circulator failed to sign with his full name, including middle name or middle initial (as was done in Chicago in the 1960s, discussed *infra*). Applying such an "interpretation" of "signature" would invalidate nearly all signature sheets.

5. THE UNWRITTEN RULES WERE INCONSISTENT WITH THE PUBLISHED RULES.

a. SHEETS REJECTED DUE TO THE LOOK OF THE CIRCULATOR'S SIGNATURE.

Defendant claims that it was fine to discard all sheets signed by a circulator, if that circulator's signature "appears to be initials." But this is not a rule applicable to candidate nominating petitions and is not contained in the MANUAL at all. As noted by the trial court (App. 37):

> Specifically, the only additional requirements for petition circulators are two: "The circulator of

> the candidate nominating petition must sign the circulator's certification. . . . " And "The circulator shall complete the date when the certification is signed and shall not collect any additional signatures on that sheet after dating the certification."

There is no requirement that the circulator's signature meet some *ad hoc*, undisclosed and subjective test, such as that admittedly applied by Defendant. There is no statute or rule that a signature be "legible." Many are not. The signature of Multnomah County Deputy District Attorney Norm Frink (see SER-382) is not "legible" as it does not appear to spell out his name. Even though his "illegible" signature is sufficient to sign a criminal indictment, it did not satisfy Defendant's subjective taste. Nor did Defendant ever notify Mr. Frink or the Nader Campaign that Mr. Frink's signature was in any way defective.

Further, every sheet also shows the printed name of the circulator, below his or her signature, thus obviating any possible concern for legibility. And, since any human being can lawfully circulate a petition in Oregon (following repeal by the 1999 Legislature of all qualifications for circulators), the only relevant question about a circulator's signature is whether the mark was made by a human being.

The MANUAL states that the circulator "must sign the circulator's certification," which all of them did. Defendant claimed authority to adopt a new definition of "sign" to mean sign in a particular manner (i.e., with a mark that is "legible" and does not "appear to be initials"). This definition is contained in no statute and in no rule. It is contrary to the plain meaning of the term "sign" or "signature." BLACK'S LAW DICTIONARY, cited above, defines it as a "name or mark." The AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2000) defines it as "One's name as written by oneself."

The uncontested testimony at trial was that Respondent rejected 318 verified voter signatures on sheets signed by the named circulators, only because their

signatures "appeared to be initials," even though every one of them submitted sworn affidavits showing that what "appeared to be initials" was in fact their normal signatures on important documents, such as drivers licenses and Social Security cards.

6. THE OREGON SUPREME COURT DECISION RECOGNIZED THAT DEFENDANT HAD APPLIED "UNWRITTEN RULES" TO DISQUALIFY THE NADER PETITIONS.

The Oregon Supreme Court decision conceded that Defendant's actions were taken pursuant to "unwritten rules," although it found that doing so was not contrary to Oregon law. The Court stated:

> It is true that the review procedures that Lindback described were not themselves written, but that does not render them unlawful.

97 P.3d at 1200 (App. 21). The Oregon Supreme Court identified no statute or published rule containing the requirements that Defendant used to reject the Nader petitions.[11]

B. THE U.S. CONSTITUTION DOES NOT ALLOW STATES TO DENY BALLOT ACCESS PURSUANT TO UNWRITTEN RULES.

Citizens are entitled to rely on published laws and rules in nominating candidates for President. The "liberty" protected from state impairment by the due process clause of the Fourteenth Amendment includes the freedoms of speech and association guaranteed by the First Amendment; these First Amendment freedoms extend to political

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[11] The Court also appeared to believe that the "written instructions to the county clerks" were somehow public. The trial court is clear that they were not; they were provided only to the county clerks and not to the public or to the Nader Campaign.

activities such as running for elective office; and state election practices must therefore serve legitimate state interests "narrowly and fairly to avoid obstructing and diluting these fundamental liberties." *Duncan v. Poythress,* 657 F.2d 691, 702 (5th Cir. 1981); quoting with approval, *Smith v. Cherry*, 489 F.2d 1098, 1100 (7th Cir. 1973), *cert. denied*, 417 U.S. 910, 94 S.Ct. 2607, 41 L.Ed.2d 214 (1974); *Briscoe v. Kusper*, 435 F.2d 1046, 1052-54 (7th Cir. 1970). Procedural due process is violated when an election authority, by a change in policy or course of conduct, actively misleads candidates or voters. *Id.*, 435 F.2d at 1055 (election commissioners could not apply "new * * * rule to nullify previously acceptable signatures without prior notice").

Briscoe offers facts and procedural due process violations strikingly similar to the present case. The Chicago Board of Election Commissioners imposed new and complex ballot placement procedures for candidate nominating petitions in contests for alderman, without notice, and refused the candidates an adequate opportunity to examine disqualified petitions. Both failures impaired liberty interests protected by the Due Process Clause of the Fourteenth Amendment. Here, Defendant disqualified scores of signatures based upon the new and *ad hoc* changes which were either written nowhere or only in the Unpublished Instructions sent to the counties by Defendant in August 2004, also issued without notice to Petitioners, the Nader Campaign, or the public.

The Seventh Circuit held that such tactics were "fundamentally inimical to due process."

> [T]he application of the new anti-duplication rule to nullify previously acceptable signatures without prior notice was unfair and violated due process. . . . The Board may not deviate from such prior rules of decision on the applicability of a fundamental directive without announcing in advance its change in policy. This is especially

> true where, as here, fundamental, constitutionally protected liberties are adversely affected, and those interested require certain knowledge of what is expected of them by the state. Until such time as the Board makes public its new determination, it is constitutionally prohibited from imposing that rule on unsuspecting persons.

Id. at 1055. The Court then turned to the new interpretation of the "proper" signing rule requiring a full name with middle initial and no nicknames.

> Nothing in the statutory language suggests that such a restrictive interpretation was necessary or would be readily understood by the general public.
>
> * * * [S]uch a rigid and technical interpretation by the Board may not be imposed in the absence of pre-existing regulations forewarning candidates. [citations omitted] Lacking such advance clarification, we conclude that the Constitution permits enforcement of the statutory rule in only the least restrictive and most obvious manner.

Id. at 1055-56. The Court summarized the election officers' conduct:

> The sum of these practices meant that petitions' signatures were disqualified for obscure or unknown reasons on the basis of evidence unavailable to the parties and without the opportunity of effective response by those adversely affected by the checkers' investigations.

Id. Here, Defendant disqualified entire sheets of verified voter signatures, with no notice to the voters, circulators, or the Nader Campaign, on grounds that were not stated in writing or any other manner available to the public or to the campaign.

In *Williams v. Sclafani,* 444 F.Supp. 906, 912 (S.D.N.Y. 1978), *aff'd*, 580 F.2d 1046 (2d Cir. 1978) the candidate had been informed that a person who registered

to vote on the street could also simultaneously sign his petition. After the candidate submitted his petitions, the Board changed its position. 444 F.Supp. at 912. The Court held the advice was a custom or practice, which induced justifiable reliance, and could not be departed from without giving prior notice to potential candidates and voters. *Id.*

Here, Plaintiffs relied upon the actual written rules and suffered from the same unfair and unconstitutional conduct – no notice of what a "signature" must look like; an irrebuttable presumption that any attempt to correct a date on a circulator's signature indicates fraud; no "findings" to support why a petition sheet was invalid; no opportunity to appeal or rebut such findings; and no access to basic evidence.

Here, Defendant provided no notice regarding his application of his "unwritten rules" but, as fully established by the trial court record, rejected hundreds of signature sheets because the circulator signatures were "illegible" or were "initials," without ever notifying the Nader Campaign or allowing them to provide any exemplars of that circulator's signature.

II. EVEN IF THE UNWRITTEN RULES HAD BEEN WRITTEN, DEFENDANT SHOWED NO COMPELLING OR EVEN IMPORTANT STATE INTEREST IN IMPLEMENTING THOSE RULES.

The implementation of a rule which disqualifies voter signatures on a nominating petition on the basis of alleged (or proven) errors by circulators (in signing, dating, or placing numbers upon the sheets) significantly burdens the collection of signatures by precluding from the verification process, without an exacting standard of compelling justification, thousands of signatures. This violates Plaintiffs' rights under the First and Fifth Amendments to the U.S. Constitution, applicable to the states by the Fourteenth Amendment.

A. STATE IMPAIRMENT OF THE EXERCISE OF FRANCHISE RIGHTS REQUIRES A SHOWING THAT IT ACHIEVES AT LEAST AN IMPORTANT STATE INTEREST.

This Court requires that burdens on the process of qualifying candidates for the federal ballot be justified by a scheme narrowly tailored to achieve a compelling state interest (know as "exacting scrutiny"). *Anderson v. Celebrezze*, 460 U.S. 780, 786-88 (1983). The Court concluded that the state must offer sufficient justification for each of the burdens imposed by its rules.

> It must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional. [Citations omitted].

460 U.S. at 789-90.

Here, the Oregon Supreme Court did no such analysis, and Defendant proffered no credible state interest and failed to address at all whether his system is narrowly tailored to achieve any legitimate interest. What is the state interest in applying unwritten rules to reject signature sheets because the Defendant does not like the look of the circulator's signature or because the date is corrected in any way? It is the burden of the state to offer and prove such justifications. *McCarthy v. Secretary of the Commonwealth*, 359 N.E.2d 291, 294 (Mass. 1977).

B. STATE ACTIONS IMPAIRING THE NOMINATION OF CANDIDATES BY MEANS OF PETITIONING MUST BE NARROWLY TAILORED TO ACHIEVE A COMPELLING STATE INTEREST.

In the years after *Anderson v. Celebrezze*, this Court adopted even higher constitutional protection for the political aims of persons gathering signatures on petitions, holding that the First Amendment protects the rights of petitioners to communicate with voters. *Buckley v. American Constitutional Law Found.*, 525 U.S. 182, 119 S.Ct. 636, 142 L.Ed.2d 599 (1999) [hereinafter *"ACLF"*]; *Meyer v. Grant*, 486 U.S. 414, 108 S.Ct. 1886, 100 L.Ed.2d 425 (1988). Such communication from petitioners to voters is the most highly protected speech and can be restricted only by means "narrowly tailored to serve an overriding state interest." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347, 115 S.Ct. 1511, 131 L.Ed.2d 426 (1995); *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 776-777, 98 S.Ct. 1407, 1415-1416, 55 L.Ed.2d 707 (1978).

Here, all of the restrictions applied by Defendant similarly impair the First Amendment rights of Plaintiffs. This is particularly true for those seeking to appear on the ballot for President and Vice-President, as the U.S. Constitution precludes the use of write-in votes (since technically all votes are cast for the "electors" to the electoral college). *Williams v. Rhodes, supra*, 393 U.S. 23, 37, 89 S.Ct. 5, 21 L.Ed.2d 24 (1968). Further, Oregon law does not allow write-in votes to be counted at all, unless all write-ins for a particular office receive more votes than any candidate. ORS 254.500.

In Oregon, being a registered voter carries two basic rights – the right to vote and the right to sign petitions. Both are fundamental rights which cannot be impaired by government actions, without a narrowly tailored approach to achieving a compelling state interest.

> Indeed, the Supreme Court has recognized that initiatives and elections for public office are the only two means by which "voters can assert their preferences," and laws that operate to restrict ballot access implicate the right to vote. *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173, 184, 99 S.Ct. 983, 990, 59 L.Ed.2d 230 (1979) (internal quotation marks omitted).

Molinari v. Powers, 82 F.Supp.2d 57, 76 (E.D.N.Y. 2000)

Further, the right to petition government for redress of grievances must mean that the petitioning process does not confront potential and actual signors with the prospect of having their signatures on petitions invalidated, regardless of the correctness of their actions in signing, because of trivial "errors" by circulators. Electors signing petitions are engaging in core political speech to the wider public by placing upon the ballot, for the consideration of all electors, their candidates.

Here, each Plaintiff elector is being denied the right to effectively sign petitions of choice by the "unwritten rules" of the Defendant. Even if these rules had been written, these policies deprive the signor of any assurance that her valid signature will be counted, because he is disqualifying entire sheets of *elector* signatures on bases that have nothing to do with their validity.

C. DEFENDANT HAS NOT SHOWN AN IMPORTANT OR COMPELLING STATE INTEREST IN REJECTING SIGNATURE SHEETS FOR "ILLEGIBLE" CIRCULATOR SIGNATURES (NEXT TO LEGIBLE PRINTED NAMES) OR CIRCULATOR SIGNATURES THAT "APPEAR TO BE INITIALS."

Defendant sought to defend his policies on generic grounds that he has "an obligation to prevent fraud in

elections" but failed to identify any sort of fraud that is prevented by his actions.

In addition, Defendant's conduct in instructing the counties to "pull out" and not verify signature sheets from certain circulators, because the circulator's signature is "illegible" or "appears to be initials," also violated due process rights. This allowed the Nader Campaign to continue to submit hundreds of signature sheets, containing over 500 signatures, collected by these "secretly banned" circulators. No government official notified the Nader Campaign of this ban, thus precluding the simple step of the filing of affidavits with the counties to remedy any perceived "problem" with the circulator's signature.

D. DEFENDANT HAS NOT SHOWN AN IMPORTANT OR COMPELLING STATE INTEREST IN REJECTING SIGNATURE SHEETS DUE TO THE CORRECTION OF TRIVIAL DATING ERRORS ON CIRCULATOR SIGNATURES.

What fraud is prevented by inconsistently applying an unwritten rule that, if a circulator begins to write an incorrect date on his own signature, there is then nothing he can do to avoid having all of the valid voter signatures on that sheet permanently disqualified? If he in any way corrects the date, Defendant throws away the sheet. Even if he completely crosses out the date, puts in the correct date and again signs the petition as circulator, Defendant throws away the sheet.

III. REJECTING CIRCULATOR SIGNATURES UNLESS THEY MATCH THE SIGNATURES UPON OREGON VOTER REGISTRATION CARDS VIOLATES THE DUE PROCESS AND FREEDOM OF TRAVEL GUARANTEES OF OUT-OF-STATE CIRCULATORS.

Defendant's "unwritten rules" also discriminated against circulators who were not registered voters of

Oregon. If Defendant found the circulator's signature "illegible" or "appears to be initials," he sometimes checked to see whether his Oregon voter registration card showed a similar signature. Otherwise, Defendant merely discarded all the verified voter signatures that the circulator had collected.

This "policy" of Defendant violates the rights of Plaintiffs who were circulators (but not registered to vote in Oregon) to participate in the nominating petition process without burdens on their right to travel across state lines and to engage in core political speech. It also violates their First Amendment rights and impermissibly discriminates against Oregon residents who are not registered to vote. *ACLF*, *supra*.

Defendant's apparent practice seeks to evade the edict in *ACLF* that a state cannot restrict the gathering of signatures on petitions to registered voters of the state. By resurrecting circulator signatures only if they match an Oregon voter registration card, Defendant is violating *ACLF*.

IV. THE WRITTEN RULES PERTAINING TO THE SEQUENTIAL NUMBER OF SIGNATURE SHEETS BY THE PETITIONER DO NOT SURVIVE STRICT SCRUTINY OR ANY LOWER LEVEL OF SCRUTINY.

A. DEFENDANT REJECTED SHEETS WITH 2,354 VALID SIGNATURES MERELY BECAUSE THE NADER CAMPAIGN DID NOT APPLY SEQUENTIAL NUMBERS TO ALL OF THE SHEETS.

Defendant rejected 1,062 sheets containing 2,354 valid and verified voter signatures on the ground that the sheets, when submitted to the counties, were not sequentially numbered. This rejection violates Plaintiffs' rights under the First and Fifth Amendments.

First, the Nader Campaign had submitted all signature sheets to the counties sequentially numbered, until they were advised by Office of the Secretary of State to begin submitting signature sheets to various counties with no initial numbering on those sheets. See Affidavit of Travis Diskin [SER-28]. Second, the counties accepted and validated all of the non-numbered sheets and themselves placed numbers on many of the sheets. Third, Defendant offered no compelling or even important or even plausible state interest that is achieved by rejecting signature sheets that are not sequentially numbered by the petitioners.

As stated in the Affidavit of Travis Diskin, the Nader Campaign was complying with the only legal requirement for the sequential numbering of the signature sheets, which is contained in the MANUAL, p. 4, which states:

> Within each individual county, sequentially number each signature sheet in the space provided; and
>
> Submit signature sheets to the appropriate county elections offices for verification * * *

The Nader Campaign did this, until very late in the petitioning effort, when they learned that the Defendant was directing some of the counties to "pull out" and reject an unknown number of signature sheets. Out of an abundance of caution, the Nader Campaign wished to submit the signature sheets to the Defendant with sequential numbering within each county packet, with no "gaps" in the numbers. This is not required by any law or any rule, but the Nader Campaign wished to avoid giving the Defendant any possible reason to reject the signature sheets.

Representatives of the Nader Campaign sought advice from the Defendant so that the Nader Campaign could avoid or fill the "gaps" in the county-by-county sequential numbering system. As shown by Travis Diskin's contemporaneous notes of the phone call [SER-32], Defendant's office staff advised him that the Nader Campaign should

submit additional completed signature sheets to the counties without sheet numbers at all, so that the sequential numbering system could be restored by plugging the new, non-numbered verified sheets into the "gaps" created by Defendant's direction to counties that they "pull out" signature sheets from the original sequence.

There is nothing in statute or rules applicable to nominating petitions that failing to number the sheets disqualifies all signatures on those sheets. In fact, the only warning applicable to circulators in the MANUAL (p. 13) is this:

> Warning: Violations of the circulator requirements may result in conviction of a felony with a fine of up to $100,000 and/or prison for up to five years.

Nor did Defendant contend that he had ever disqualified before a signature sheet on a candidate nominating petition on this basis.

Further, such inconsequential petition deficiencies are not disqualifying. *Stern v. Board of Elections*, 237 N.E.2d 313, 14 Ohio St.2d 175 (1968). Illinois laws required sequential page numbering of candidate nomination petition sheets. In *Stevenson v. County Officers Electoral Board*, 58 Ill.App.3d 24, 26, 15 Ill.Dec. 571, 373 N.E.2d 1043 (1978), the court held that a candidate's failure to number the pages of his 48-page nominating petition was a mere technical violation of the Election Code and not disqualifying.[12]

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[12] Courts in some states avoid constitutional issues by applying a "substantial compliance" rule to requirements such as the numbering of petition sheets, even where such requirements are mandatory. *Turner v. Lawley*, 305 N.Y.S. 357 (NY 1969).

B. DEFENDANT VIOLATED THE RIGHTS OF PLAINTIFFS' IN REJECTING SIGNATURE SHEETS FOR LACK OF NADER-APPLIED SEQUENTIAL NUMBERING.

Here, the Nader Campaign was complying with the sequential numbering requirement, until advised by Defendant's employee not to do so. The Nader Campaign had utterly no reason to stop complying, apart from the advice received from Defendant's office.

Independently, Plaintiffs' rights were violated by imposition of a sequential numbering requirement for which Defendant offered no compelling or even important state interest. At trial, John Lindback admitted that the counties themselves had placed numbers on the signature sheets that the campaign had filed with the counties without numbers. Hearing 11:47.03. In fact, he testified, "We did not know who had numbered what." Hearing 11:49:48 This admission precludes Defendant's implicit finding that the Nader Campaign did not number a certain number of sheets submitted to the counties. When asked by the trial judge whether Defendant had previously accepted such petitions with sheet numbers placed by the county officials, Lindback could not recall that issue ever coming up in the past. 12:06:45.

The counties had no problem with verifying the signatures on sheets, with or without Nader-applied sheet numbers, and in fact verified 2,354 signatures on those petitions. Defendant had no reason to insist on Nader-applied sheet numbers on all of the sheets submitted to Defendant, particularly since the counties had already put their own numbers on the sheets and since every sheet was also an original affidavit signed by a county official.

That Defendant allowed the counties to continue to accept, without objection, non-numbered signature sheets and entirely failed to notify the Nader Campaign that such sheets would later be rejected, violated Plaintiffs' rights to due process notice prior to the deprivation of a protected

liberty interest. *Bell v. Burson*, 402 U.S. 535, 542, 91 S.Ct. 1586, 1591, 29 L.Ed.2d 90 (1971); *Fuentes v. Shevin*, 407 U.S. 67, 82, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1983).

There is no question that the rights to be nominated for federal office and to circulate and collect signatures on nominating petitions involve fundamental liberty interests which require notice and opportunity to contest prior to deprivation.

V. DISCARDING VALID, VERIFIED VOTER SIGNATURES DUE TO ALLEGED "ERRORS" BY A CIRCULATOR DENIES VOTERS EQUAL PROTECTION UNDER THE LAW.

The Equal Protection clause of the Fourteenth Amendment requires that similarly situated people be treated alike. *City of Cleburne v. Cleburne Living Center,* 473 U.S. 432, 439, 105 S.Ct. 3249, 3254, 87 L.Ed.2d 313 (1985). It generally "protects citizens from arbitrary or irrational state action." *Batra v. Board of Regents of the Univ. of Nebraska,* 79 F.3d 717, 721 (8th Cir.1996).[13]

Here, Defendant discarded over 3,000 voter signatures already verified as valid by counties. The disqualified voters were all duly registered Oregon voters. Yet, a minimum of 3,072 of those voters (718 plus 2,354) lost their rights to express their political views because of alleged minor circulator errors totally unrelated to any conduct by the voters. In this case the class of voters whose signatures were tossed for trivial and arbitrary "errors" in the date or signature or numbering may be small but is crucial to the rights of all other signors and

[13] The "purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the state's jurisdiction against intentional and arbitrary discrimination . . . occasioned . . . by its improper execution through duly constituted agents." *Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441, 445, 43 S.Ct. 190, 67 L.Ed. 340 (1923).

the candidates. "A class of one is likely to be the most vulnerable of all," and accordingly, such a class should not be denied the protection of the equal protection clause. *Esmail v. Macrane*, 53 F.3d 176, 180 (7th Cir. 1995).

These disenfranchised voters suffered "intentional" discrimination within the meaning of equal protection jurisprudence. *Lewis v. City of Fort Collins*, 903 F.2d 752, 755 n.1 (10th Cir. 1990) (footnote omitted), quoted with approval, *Welsh v. City of Tulsa*, 977 F.2d 1415, 1420 (10th Cir. 1992). Thus the equal protection clause may be violated whenever regulations are not rationally related to a legitimate government interest. See *Schweiker v. Wilson*, 450 U.S. 221, 230, 101 S.Ct. 1074, 67 L.Ed.2d 186 (1981).

Moreover, "a number of facially valid election laws may operate in tandem to produce impermissible barriers to constitutional rights." *Storer v. Brown*, 415 U.S. 724, 737, 94 S.Ct. 1274, 39 L.Ed.2d 714 (1974). That is what occurs in this case. Therefore, "a reviewing court must determine whether 'the totality of the [state's] restrictive laws taken as a whole imposes a[n unconstitutional] burden on voting and associational rights." *Williams v. Rhodes*, *supra*, 393 U.S. at 34.

VI. THE OREGON SUPREME COURT'S CONSTITUTIONAL ANALYSIS WAS INCORRECT.

The Oregon Supreme Court concluded that Applicants' rights under the U.S. Constitution were not violated, because, "like all political participants," they must "comply with the pertinent signature gathering procedures, that Oregon law requires." That analysis would allow a State to impose any requirement it may choose, regardless of its effect on the constitutional rights of voters, circulators, and candidates. There is no support for this proposition in federal case law.

As for the Oregon Supreme Court's analysis of *ACLF*, *supra*, the fact that this Court found some of Colorado's unchallenged statutory requirements as not in violation

the U.S. Constitution does not mean that all statutory requirements, no matter what they are, are immune from constitutional attack. In this case, Applicants submitted far more than enough verified voter signatures, without violating the written terms of any Oregon statute or rules. The Oregon Supreme Court then mentions fraud, but neither that Court, nor Defendant, identified the potential fraud that is in any way countered by application of the "unwritten rules" or of the sequential sheet numbering requirement.

The Oregon Supreme Court simply failed to address the severe burden placed upon Plaintiffs by the retroactive application of unwritten rules and by the application of the sequential sheet numbering requirement, despite Defendant's advice to the Nader Campaign to discontinue such numbering late in the signature drive. Nor did that Court address whether the Oregon scheme is narrowly tailored to achieve whatever state interest could have been identified. Thus, the Oregon Supreme Court misstated the applicable constitutional law and rendered a decision in conflict with governing precedent of the United States Supreme Court.

This case also raises important issues of federal constitutional law having significant practical consequence. If state law allows state officials to retroactively apply unwritten rules to disqualify entire sheets of valid and verified voter signatures, there is no practical way for independent candidates to run for federal office.

Dated: December 22, 2004

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No. _____

In The
Supreme Court of the United States

SANDRA KUCERA, SARAH THERESE WINDER, KRISTIN ZUBEL, NATALIE BOLTON, PHILLIP SALISBURY, SAMANTHA BERG, TIMOTHY JOHNSON and GREGORY KAFOURY,

Petitioners,

v.

BILL BRADBURY, Secretary of State, DEMOCRATIC PARTY OF OREGON, JOHN NEEL PENDER and JAMES EDMUNSON,

Respondents.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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337 Or. 384, 97 P.3d 1191

Supreme Court of Oregon,
En Banc.

Sandra KUCERA, an elector of Oregon and candidate for Vice President of the United States, Sarah Therese Winder, Kristen Zubel, and Natalie Bolton, each an elector of Oregon and signor of petition for nomination of Ralph Nader for President of the United States and Sandra Kucera as Vice President of the United States and as a circulator of said nominating petition, Phillip Salisbury and Samantha Berg, each an elector of and signor of a petition for nomination of Ralph Nader for President of the United States and Sandra Kucera as Vice President of the United States, Timothy Johnson, a circulator of said nominating petition who is not an elector of Oregon, Gregory Kafoury, an individual, an elector of Oregon and Co-Chair, Nader for President 2004 in Oregon,
Plaintiffs-Adverse Parties,
v.
Bill BRADBURY, Secretary of State,
Defendant-Relator,
and
Democratic Party of Oregon, John Neel Pender and James Edmunson,
Intervenors Below.

(CC 04C18259; SC S51756)
Submitted Sept. 17, 2004.
Decided Sept. 22, 2004.

Original proceeding in mandamus.*

* On petition for a writ of mandamus from an order of the Marion County Circuit Court, Paul Lipscomb, Judge.

Kaye E. McDonald, Assistant Attorney General, Salem, filed the petition and supplemental memorandum for defendant-relator. With her on the petition and memoranda were *Hardy Myers*, Attorney General, and *Mary H. Williams*, Solicitor General.

Daniel W. Meek, Portland, filed the memorandum in opposition for plaintiffs-adverse parties.

Margaret Olney, Smith, Diamond & Olney, Portland, filed the memorandum for amici curiae Service Employees International Union and Oregon Education Association.

DURHAM, J.

Oregon's Secretary of State Bill Bradbury seeks a writ of mandamus from this court requiring Judge Lipscomb of the Marion County Circuit Court to vacate an order that he entered in the underlying proceeding, which we describe below in detail. The order required the Secretary of State to certify the nomination of Ralph Nader as an independent candidate on Oregon's November 2, 2004, general election ballot. For the reasons set out below, we direct that a peremptory writ of mandamus issue requiring the trial court to withdraw that order.

THE NADER CAMPAIGN'S PETITION FOR NOMINATION BY INDIVIDUAL ELECTORS

Oregon law provides for the nomination of candidates for partisan public office by a major political party, ORS 249.078, a minor political party, an assembly of electors, or individual electors, ORS 249.705. ORS 249.740 describes the procedure for nomination of candidates by individual electors:

"(1) A certificate of nomination made by individual electors shall contain a number of signatures of electors in the electoral district equal to not less than one percent of the total votes cast in the electoral district for which the nomination is intended to be made, for all candidates for presidential electors at the last general election.

"(2) Each elector signing a certificate of nomination made by individual electors shall include the residence mailing address of the elector. Except for a certificate of nomination of candidates for electors of President and Vice President of the United States, a certificate of nomination made by individual electors shall contain the name of only one candidate.

"(3) Before beginning to circulate the certificate of nomination, the chief sponsor of the certificate shall file a signed copy of the prospective certificate with the filing officer referred to in ORS 249.722. The chief sponsor of the certificate shall include with the prospective certificate a statement declaring whether one or more persons will be paid money or other valuable consideration for obtaining signatures of electors on the certificate. After the prospective certificate is filed, the chief sponsor shall notify the filing officer not later than the 10th day after the chief sponsor first has knowledge or should have had knowledge that:

"(a) Any person is being paid for obtaining signatures, when the statement included with the prospective certificate declared that no such person would be paid.

"(b) No person is being paid for obtaining signatures, when the statement included with the prospective certificate declared that one or more such persons would be paid.

"(4) The circulator shall certify on each signature sheet that the individuals signed the sheet in the presence of the circulator and that the circulator believes each individual is an elector registered in the electoral district.

"(5) The signatures contained in each certificate of nomination made by individual electors shall be certified for genuineness by the county clerk under ORS 249.008.

"(6) As used in this section, 'prospective certificate' means the information, except signatures and other identification of certificate signers, required to be contained in a completed certificate of nomination."

Under ORS 249.740(5), the county clerk must certify for genuineness the signatures of electors in the county that accompany the certificate of nomination by individual electors. ORS 249.008 requires the county clerk of each county, before the filing of the certificate of nomination by individual electors, to verify the elector signatures and to certify the number of signatures believed to be genuine. ORS 249.008 provides, in part:

"(1) Except as provided in subsection (2) of this section, before a nominating petition, minutes of an assembly of electors, or petition by individual electors is offered for filing, the county clerk of each county in which the signatures were secured shall compare the signatures of electors on the petition or minutes with the signatures of the electors on the elector registration cards. Any petition or minutes submitted for verification under this section shall contain only original signatures. The county clerk shall attach to the petition or minutes a certificate stating the number of signatures believed to be genuine. The certificate is

prima facie evidence of the facts stated in it. A signature not included in the number certified to be genuine shall not be counted by the officer with whom the petition is filed. No signature in violation of the provisions of this chapter shall be counted.

"(2) If the total number of signatures presented to a county clerk for verification is 15,000 or more, the county clerk may use a statistical sampling technique authorized by the Secretary of State to verify the signatures. The sample shall be drawn from at least 100 percent of the number of signatures required for nomination."

ORS 249.009(1) authorizes the Secretary of State to adopt administrative rules prescribing the form of certificates of nomination by individual electors and a system for numbering all signature sheets of certificates for nomination by individual electors.

"The Secretary of State by rule shall:

"(a) Design the form of nominating or recall petitions, certificates of nomination by individual electors, minutes of an assembly of electors or minor political party formation petitions; and

"(b) Prescribe a system for numbering all signature sheets of nominating or recall petitions, certificates of nomination by individual electors, minutes of an assembly of electors or minor political party formation petitions."

The Secretary of State has exercised the authority that ORS 249.009(1) grants by designating as an administrative rule the "2004 State Candidate's Manual: Individual Electors" (SCMIE). OAR 165-010-0005(5). We discuss below in greater detail the rules that the SCMIE contains.

Plaintiffs are supporters of a campaign (the "Nader campaign") that seeks to nominate Ralph Nader and Sandra Kucera as President and Vice President, respectively, of the United States on the November 2, 2004, Oregon general election ballot through the nomination by individual electors procedure described in ORS 249.740. According to the record, ORS 249.740(1) obligated the Nader campaign to file not less than 15,306 signatures of Oregon electors with its certificate of nomination by individual electors under ORS 249.740(1). However, the Secretary of State determined that numerous signature sheets that the Nader campaign filed with its certificate of nomination contained errors in the certification or dating of the sheets by circulators or in the numbering of the sheets by Nader campaign representatives. In addition, a number of county clerks, acting on instructions from the Secretary of State, declined to verify elector signatures on sheets that reflected errors that the Secretary of State identified. In some cases, they removed the noncomplying signature sheets from the group of signatures certified for genuineness under ORS 249.740(5). Plaintiffs do not agree that the asserted errors in the signature sheets exist or, if they do exist, that they affect the validity of the elector signatures or the certificate of nomination by individual electors.

Due to his conclusion that numerous signature sheets did not comply with applicable legal requirements, the Secretary of State declined to count the elector signatures on the noncomplying signature sheets in determining whether sufficient valid elector signatures supported the certificate of nomination. On September 2, 2004, the Secretary of State notified Nader that his campaign had submitted 15,088 qualified signatures, which was 218

signatures short of the required number. The Secretary of State advised Nader, "Consequently, there are not sufficient qualified signatures for you to gain ballot access for this office."

PLAINTIFFS' LEGAL ACTION

On September 3, 2004, plaintiffs filed in Marion County Circuit Court an appeal of the action of the Secretary of State under ORS 246.910[1] and a petition for review

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[1] ORS 246.910 provides:

"(1) A person adversely affected by *any act or failure to act by the Secretary of State,* a county clerk, a city elections officer or any other county, city or district official under any election law, or by *any order, rule, directive or instruction made by the Secretary of State,* a county clerk, a city elections officer or any other county, city or district official *under any election law,* may appeal therefrom to the circuit court for the county in which the act or failure to act occurred or in which the order, rule, directive or instruction was made.

"(2) Any party to the appeal proceedings in the circuit court under subsection (1) of this section may appeal from the decision of the circuit court to the Court of Appeals.

"(3) The circuit courts and Court of Appeals, in their discretion, may give such precedence on their dockets to appeals under this section as the circumstances may require.

"(4) The remedy provided in this section is cumulative and does not exclude any other remedy against any act or failure to act by the Secretary of State, a county clerk, a city elections officer or any other county, city or district official under any election law or against any order, rule, directive or instruction made by the Secretary of State, a county clerk, a city elections officer or any other county, city or district official under any election law."

(Emphasis added.)

of administrative action under ORS 183.484.[2] Plaintiffs alleged eight claims for relief. We summarize those claims for relief, because they are relevant to our disposition here.

The first claim for relief alleged that the Secretary of State's "decision to reject the nominating petitions was not accompanied by any findings of fact or conclusions of law sufficient to enable Plaintiffs (or anyone) to determine the reasons for the rejection" and that "[s]uch deficiency renders the decision unlawful."

The second claim for relief alleged that the Secretary of State "has apparently rejected over 3,000 valid and verified voter signatures" due to "some errors" committed by persons who circulated signature sheets or by the Nader campaign. Plaintiffs alleged that the refusal of the Secretary of State to count those signatures "is beyond his authority, is arbitrary and capricious, and is otherwise unlawful."

The third claim for relief alleged that the Secretary of State had rejected signature sheets "containing in the range of 2,000 valid and verified voter signatures on the ground that the sheets, as submitted to the Secretary of State, were not sequentially numbered." Plaintiffs asserted that the

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[2] ORS 183.484(1) provides:

"Jurisdiction for judicial review of orders other than contested cases is conferred upon the Circuit Court for Marion County and upon the circuit court for the county in which the petitioner resides or has a principal business office. Proceedings for review under this section shall be instituted by filing a petition in the Circuit Court for Marion County or the circuit court for the county in which the petitioner resides or has a principal business office."

Nader campaign had complied with applicable requirements for numbering sheets and that the Secretary of State's action was unlawful.

The fourth claim for relief alleged that the Secretary of State had rejected signature sheets containing "in the range of 700 valid and verified voter signatures on the ground that the sheets display some defect in the signature of the circulator or the date on the signature of the circulator." Plaintiffs asserted that the Secretary of State had "not stated which signature sheets were rejected for these reasons" and "has not stated the reason for the rejection of any signature sheet * * * ." Plaintiffs alleged that the Secretary of State's rejection of signature sheets due to the appearance of or date pertaining to a circulator's signature was unlawful.

The fifth claim for relief alleged that the Secretary of State's implementation of a rule that disqualified voter signatures on a nominating petition on the basis of alleged or proven errors by petition circulators, in signing, dating, or placing numbers on the sheets, violated the First and Fifth Amendments to the United States Constitution.[3]

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[3] The First Amendment to the United States Constitution provides:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." The Fifth Amendment to the United States Constitution provides:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice

(Continued on following page)

The sixth claim for relief alleged that the Secretary of State's implementation of a rule that disqualified voter signatures on a nominating petition on the basis of alleged or proven errors by petition circulators – in signing, dating, or placing numbers on the sheets with no opportunity for administrative cure of alleged defects – violated Article I, sections 8 and 20, and Article II, section 1, of the Oregon Constitution.[4]

The seventh claim for relief alleged that the Secretary of State's implementation of a rule that disqualified a circulator's signature if it varied from the signature on the circulator's Oregon voter registration card discriminated against Oregon voters who are not registered to vote and violated the First Amendment right of plaintiffs to travel across state lines into Oregon to engage in core political speech and to circulate petition sheets.

Plaintiffs' eighth claim for relief sought reasonable attorney fees and costs for the action. Plaintiffs also

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put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

[4] Article I, section 8, of the Oregon Constitution provides:

"No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right."

Article I, section 20, of the Oregon Constitution provides:

"No law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens."

Article II, section 1, of the Oregon Constitution provides: "All elections shall be free and equal."

requested declaratory and injunctive relief nullifying the Secretary of State's action.

Along with their complaint, plaintiffs filed a motion for preliminary injunction requiring the Secretary of State "to certify the Nader/Kucera ticket for the 2004 general election ballot * * * ." Plaintiffs supported the motion with affidavits from several circulators of the certificate of nomination signature sheets.

THE TRIAL COURT PROCEEDING

The case came before the trial court on September 8, 2004, on plaintiffs' motion for preliminary injunction. The court granted the motion of the Democratic Party of Oregon and two of its officers to intervene in support of the Secretary of State. The court denied a request by Service Employees International Union (SEIU) to intervene as a party, but allowed SEIU to appear as *amicus curiae*. The parties stipulated that the court could combine the hearing on the motion for preliminary injunction, including live testimony, affidavits, and all arguments, with a trial on the merits.

On September 9, 2004, the court filed its opinion and order, which we discuss below in greater detail. In the opinion, the court reviewed the pertinent statutes and administrative rules governing nominations by individual electors and focused its analysis on plaintiffs' fourth claim for relief, described above.

The court concluded that the Secretary of State had no authority, under applicable statutes and rules, to instruct county clerks to screen signature sheets for various problems related to the signature of the circulator

and the date of the circulator's signature. Those problems included the action of some circulators in certifying the signature sheets with the signer's initials or to cross out or attempt to modify the date ~~of the circulator's cer~~tification. The court also concluded that the Secretary of State's instructions to county clerks to screen elector signature sheets for circulator signature and dating problems before verifying the elector signatures were inconsistent with ORS 247.005,[5] with the Secretary of State's written rules in the SCMIE, and "with the Secretary's policy position set out in *Nelson v. Keisling* [, 155 Or.App. 388, 964 P.2d 284 (1998), *rev. den.*, 328 Or. 246, 987 P.2d 507 (1999)]." We analyze those bases for the court's conclusion below.

Ultimately, the court concluded that the Secretary of State had exceeded his authority by (1) instructing county clerks not to verify elector signatures if the signature sheets displayed circulator certification problems; and (2) disapproving elector signature sheets that county clerks had certified if the signature sheets displayed similar circulator certification problems.

The court rejected plaintiffs' third claim for relief, which alleged that the Secretary of State had exceeded his authority in rejecting signature sheets that had not been numbered sequentially. The court did not address or resolve other claims for relief in its order and opinion.

On September 13, 2004, the court entered a general judgment that stated:

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[5] ORS 247.005 provides:

"It is the policy of this state that all election laws and procedures shall be established and construed to assist the elector in the exercise of the right of franchise."

"This case came before the Court upon plaintiffs' Motion for a Preliminary Injunction and heard on September 8, 2004. By stipulation of the parties, the request for preliminary relief was combined with trial on the merits, including live testimony, testimony by affidavits, oral argument and extensive legal briefing by the parties, including intervenor-defendant, Democratic Party of Oregon. The Court issued its Order and Opinion dated September 9, 2004 with regard to plaintiffs' third and fourth claims for relief as set forth in said opinion and order, and finding that its ruling on the fourth claim for relief is dispositive of the merits without reaching constitutional claims, now enters judgment as follows:

"Now, hereby, it is ORDERED and ADJUDGED:

"1. Defendant Secretary of State is hereby ordered to certify the results of the nominating petitions of Ralph Nader and Sandra Kucera for independent candidate to the appropriate elections authorities and to order the preparation of ballots for President and Vice-President for the 2004 General Election which contain the names of Ralph Nader and Sandra Kucera as independent candidates for President and Vice-President.

"2. Plaintiffs are entitled to recover their costs and disbursements incurred herein."

POST-JUDGMENT PROCEEDINGS

The Secretary of State filed his petition for writ of mandamus on September 15, 2004. With the petition, he also filed an emergency motion requesting expedited review of the petition and a decision from this court by September 22, 2004, if possible, so that elections officials

could proceed with the printing of accurate ballots for the November 2, 2004, general election.

On September 16, 2004, this court allowed the motion to expedite review and set an accelerated briefing schedule. In addition, this court allowed a motion by SEIU and the Oregon Education Association to appear as *amici curiae*. The parties filed their briefs and excerpts of record on September 17, 2004, and the court took the petition under advisement. The court expresses its appreciation to counsel for all parties and *amici curiae* for their cooperation and prompt submission of materials to the court in this case.[6]

MANDAMUS IS AN APPROPRIATE REMEDY

Plaintiffs assert that mandamus is not an appropriate remedy in the circumstances. We disagree. The Secretary of State has a strong interest in a prompt resolution through this mandamus proceeding of plaintiffs' challenge to his authority to reject the certificate of nomination by individual electors filed by the Nader campaign. The petition seeks the determination of questions of law regarding the authority of the Secretary of State, not to control discretionary determinations by the trial court, as plaintiffs argue. Without a prompt resolution of plaintiffs' challenge to the authority of the Secretary of State, the state's strong interest in the efficient administration of the November 2, 2004, general election will suffer irreparable

[6] In addition to this mandamus proceeding, the Secretary of State filed an appeal from the trial court's general judgment. On September 16, 2004, the Court of Appeals entered an order certifying the appeal to this court under ORS 19.405 and ORAP 10.10. On the same day, this court accepted the certification.

injury. Under the circumstances, the Secretary of State's right to appeal from the trial court's judgment provides a remedy at law that is chimerical at best.

Plaintiffs further argue that this mandamus proceeding improperly seeks to resolve unadjudicated questions of fact. They contend, for example, that the Secretary of State was estopped from requiring the submission of sequentially numbered signature sheets to each county by reason of advice that the "appropriate person" in the Secretary of State's office had given to the Nader campaign. Additionally, plaintiffs argue that they asserted in the trial court the factual claim that the circulator signatures on a large number of rejected signature sheets were indeed authentic signatures. Again, we disagree.

Plaintiffs challenged several actions of the Secretary of State, including the application of administrative rules, the promulgation and application of written instructions and directives, and the determination that the Nader campaign had filed insufficient elector signatures to support a certificate of nomination by individual electors. Properly viewed, the issues in this mandamus proceeding concern a single legal question: Did Oregon law authorize the Secretary of State to take the actions that he took at the time he acted? As that question makes clear, the facts that are most pertinent to that inquiry are those that responsible elections officials knew or should have known when they acted. We turn now to the legal question stated above.

AUTHORITY OF SECRETARY OF STATE TO DISQUALIFY ELECTOR SIGNATURES DUE TO VIOLATION OF CIRCULATOR SIGNATURE REQUIREMENTS

The premise for the trial court's decision was that no statute or rule expressly authorized the Secretary of State to prohibit the counting of otherwise valid signatures of electors that supported a certificate of nomination simply because of arguable violations of signature and dating requirements respecting circulators. The trial court also believed that disqualification of elector signatures was inconsistent with ORS 247.005 and with "the prior policy of the Elections Division," as recited in the Court of Appeals decision in *Nelson*. For the following reasons, we disagree with the trial court.

The legislature has acted in several ways to provide the procedures for nominating candidates by individual electors. First, the legislature has enacted ORS 249.740. Second, the legislature has adopted several statutes that delegate authority over that procedure, and other election procedures, to the Secretary of State. ORS 249.009(1), quoted above, is one example. In addition to authorizing rulemaking, the legislature has enacted ORS 246.110, which provides:

> "The Secretary of State is the chief elections officer of this state, and it is the secretary's responsibility to obtain and maintain uniformity in the application, operation and interpretation of the election laws."

The legislature also has enacted ORS 246.150, which provides:

> "The Secretary of State may adopt rules the secretary considers necessary to facilitate and assist in achieving and maintaining a maximum degree of correctness, impartiality and efficiency in administration of the election laws."

In addition to the foregoing authority, and to ensure that the Secretary of State carries out the responsibility described in ORS 246.110, the legislature has required the Secretary of State to communicate with each county clerk through written directives and other means on election procedures that are under the direction and control of the county clerk. ORS 246.120 provides:

> "In carrying out the responsibility under ORS 246.110, the Secretary of State shall prepare and distribute to each county clerk detailed and comprehensive *written directives,* and shall *assist, advise and instruct* each county clerk, on registration of electors and election procedures which are under the direction and control of the county clerk. The directives and instructions shall include relevant sample forms of ballots, documents, records and other materials and supplies required by the election laws. A county clerk affected thereby shall comply with the directives or instructions."

(Emphasis added.)

As already noted, the Secretary of State exercised the rulemaking authority that ORS 249.009(1) delegates by adopting SCMIE as a rule. The record also demonstrates that the Secretary of State exercised his authority under ORS 246.120 by issuing written instructions to all county clerks regarding the verification of elector signature sheets from the Nader campaign, including directions for addressing potential problems with the signature and dating

of signature sheets by circulators.[7] The written instructions to the county clerks from John W. Lindback, Director of the Elections Division for the office of Secretary of State, stated:

> "Following are procedures we need all counties to follow when verifying the signature sheets for the Nader for President petition.
>
> "1. Counties will initially screen for potential problems with circulator signature and dating of signature sheets.
>
> "2. Counties will highlight with a highlighter the areas of concern on the signature sheet. **Do not** verify any signatures on the sheets that have any potential problems or issues. Once the Secretary of State's office makes a determination on these sheets, the county will be contacted and advised on whether to verify these signatures or to reject the sheet.
>
> "3. The areas to review for concern are:
>
> "The circulator signature line is blank or the circulator has signed using initials only. (First name initial with the full last name is sufficient).
>
> "There is no date on the circulator date signed line.

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[7] The record contains no evidence that any campaign other than the Nader campaign was employing the nomination procedure in ORS 249.740 at the time. That accounts for the reference to the Nader campaign in the written instructions now before us. We assume that the written instructions are applicable generally to all the elections procedures to which the Secretary of State has addressed them, not just to a single candidate or campaign, until the Secretary of State withdraws, modifies, or supercedes them. We note also that the candidate nominating process that is the subject of this case comprises a different set of statutes than those associated with ballot measures.

"Circulator date has been crossed out or modified.

"The circulator signed and dated **before** the dates of some or all of the the [sic] signers.

"Circulator name is a signature stamp.

"Circulator signature is photocopied or carbon copied.

"White out is used on the circulator name or date area.

"There are two **different** circulator names on the certification.

"The original signature of a circulator has been crossed out, and a new circulator's signature is inserted.

"4. Once the counties have screened for these items the county will fax any sheets of concern to the Secretary of State Elections Division * * * [Elections Division officials] will make the final determination on these sheets.

"5. Counties will retain and not return any signature sheets to the Nader Campaign that may have any potential problems until the Secretary of State has resolved these issues and notified the county.

"6. On signature sheets that have no issues and appear to be sufficient, the counties will verify the signatures and cross through any blank signature lines on the signature sheets with a marker so that no other signers may be added to that sheet **after** the county has verified the sheets.

"7. Counties will verify all signatures submitted only on signature sheets that do not have any issues. The county will retain a copy of all signature sheets submitted and return the original sheets with the counties certification to the Nader Campaign."

(Boldface in original.)

Lindback explained by affidavit the circulator signature review procedures that his office followed in inspecting the signature sheets that the county elections officials submitted. According to Lindback, state officials accepted a circulator's signature if the signature sheet bore a mark that appeared to be that person's signature. However, they engaged in further review if the purported signature was illegible or appeared to consist only of initials. That further review sought to confirm that the mark was the circulator's valid signature. To that end, state officials compared the mark on the signature sheet with the signature on the circulator's voter registration card, if applicable, or another signature exemplar. Lindback stated:

> "It bears emphasis that our practice is to accept a purported circulator's signature if there is any reasonable way to do so."

Lindback also described the procedures that his office followed to confirm compliance by circulators with the requirement that they state the date on which they certified each signature sheet. In general, state officials rejected signature sheets containing no date or alterations in the date, such as stricken material, but accepted signature sheets that the circulator had redated and re-signed or sheets that told a "clear story" about their completion and whose circulators apparently had completed the certification properly.

The trial court determined that the signature and date review procedures that Lindback had followed in his office were "unwritten rules," that they were "not supported by the written administrative rules as set forth in the Manual," that they were "inconsistent with ORS 247.005" and "the prior policy of the Elections Division" as

stated in *Nelson,* and that they "were not applied either uniformly or consistently in actual practice."

It is true that the review procedures that Lindback described were not themselves written, but that does not render them unlawful. On the contrary, the review procedures are nothing more than the step-by-step process by which the Secretary of State carried out legal authority found elsewhere in statute, in rule, and in the Secretary of State's written instructions to the county clerks. The review procedures were not, as the trial court's comments appear to suggest, yet another layer of unannounced legal barriers. They were, instead, the methodology by which the Secretary of State enforced existing legal standards. Specifically, Lindback designed the review procedures as a means to carry out the Secretary of State's duty under ORS 246.110 to "obtain and maintain uniformity in the application, operation and interpretation of the election laws." The necessity for the review procedures arose in this case because the Secretary of State gave written instructions to the county clerks to return to the Secretary of State for further review all signature sheets "that have any potential problems or issues," and gave them a list of those potential problems. The review procedures that Lindback described did not enlarge upon the written list; rather, they merely effectuated it with the goal of insuring that review by his office was a uniform process. The trial court's concern in this respect was not well taken.

The trial court's criticism that the Secretary of State's review procedures were "not supported by the written administrative rules as set forth in the [SCMIE]" appears also to reflect a concern that the SCMIE provides that a signature sheet format violation "will result in the rejection of those sheets," but does not similarly warn of

potential rejection of signature sheets for other errors, such as in the signature and dating of sheets by circulators. Relatedly, the trial court noted that the SCMIE warns that violation of the circulator certification requirements may result in conviction of a felony with a significant fine and imprisonment, but gives no notice that a violation of those requirements will lead to a disqualification of the elector signatures.

Those concerns of the trial judge also are not well taken. In practical terms, the trial court construed the SCMIE not to permit the sanction of disqualification of elector signatures due to circulator certification errors, because, although the SCMIE mentioned other potential sanctions, it did not mention that particular sanction under these particular circumstances. But, when we consider the circulator certification rules in context, their silence about the possible effect of a violation on the validity of elector signatures is just that – silence. The notice in the rule that certain criminal consequences "may result" from a violation is a pointed warning to circulators, not an assurance to electors who sign the signature sheet that their signatures will count despite the circulator's improper certification.

It is important to remember that ORS 249.740(4) requires each circulator to *certify* on each signature sheet that the signer had signed the sheet in the circulator's presence and that the circulator believed that the signer was an elector registered in the electoral district. The term "certify" means "to attest esp. authoritatively or formally * * * to present in formal communication, esp. in a document under hand or seal * * * ." *Webster's Third New Int'l Dictionary* 367 (unabridged ed. 1993). In keeping with the legislature's requirement of a formal attestation, SCMIE

requires the circulator to "sign" the signature sheet, and the Secretary of State's written instructions call for the use of a "signature." A "signature" is "the name of a person written with his own hand to signify that the writing which precedes accords with his wishes or intentions." *Id.* at 2116. Thus, for example, the Secretary of State logically could disqualify a mark that consisted of mere initials, because the mark fails to display the required signature. *See Don't Waste Oregon Com. v. Energy Facility Siting,* 320 Or. 132, 142, 881 P.2d 119 (1994) (sustaining "agency's plausible interpretation of its own rule").

In adopting the rules set out in the SCMIE, in issuing written instructions to the county clerks, and in utilizing the circulator signature and date review procedures, the Secretary of State was obtaining and maintaining uniformity in the operation of an election law, *i.e.,* the certification requirement in ORS 249.740(4), as ORS 246.110 required. The Secretary of State thus may conclude, and clearly has so concluded, that a circulator's failure to comply with the Secretary of State's requirements for circulator certification means that the purported certification is invalid and the signature sheet does not comply with ORS 249.740(4).

The trial court opined that there was no valid policy reason to enforce the circulator certification requirement by disqualifying the signature of an elector if the county clerk had been able to verify that the electors' signatures on the disqualified sheets were genuine. That overlooks the requirement in ORS 249.740(4) that the circulator must certify that the individual signed the sheet *in the presence of the circulator.* The bare presence of an elector's signature on a sheet is not enough to show compliance with that requirement. The certification requirement

serves to discourage fraud in the execution of signature sheets. The Secretary of State's choice to invalidate a signature sheet if the circulator violates the certification requirement promotes that objective. The trial court's concerns in this respect were not legally justified.

We next note that the trial court's reliance on ORS 247.005 was misplaced. That statute is the legislature's statement of state policy to assist electors in the exercise of the franchise. It does not purport to invalidate rules and procedures that the Secretary of State lawfully adopts pursuant to statutory command or delegated authority. Were the rule otherwise, virtually any election law or rule would be vulnerable to invalidation under ORS 247.005. We decline to accord that intention to the legislature.

The trial court's reliance on *Nelson,* 155 Or.App. 388, 964 P.2d 284, also was misplaced. In *Nelson,* the Court of Appeals determined that a civil penalty of a $250 fine was the exclusive remedy for violation of an election statute, ORS 260.560, and that the legislature did not authorize the invalidation of signatures as an additional remedy. The court stated:

> "Neither ORS 260.560 nor OAR 165-014-0005 spells out the consequence for violating the requirement that petition circulators be Oregon registered voters. ORS 260.995, however, provides that the Secretary or the Attorney General may impose a civil penalty not to exceed $250 " 'for each violation of any provision of Oregon Revised Statutes relating to the conduct of any election, any rule adopted by the Secretary of State under ORS chapters 246 to 260 or any other matter preliminary to or relating to an election, for which no penalty is otherwise provided.'

> "There is no question that the civil penalty provision applies to violations of ORS 260.560 and OAR 165-014-0005 (1996). The question is whether that remedy is the exclusive remedy for violations of the statute and the rule. Certainly, nothing in the language of the statute suggests any legislative intention to make the civil fine cumulative of other remedies such as the invalidation of signatures. The legislature expressly has provided for invalidation of signatures upon violation of other statutes. *See, e.g.,* ORS 249.008(1) ('No signature in violation of the provisions of this chapter shall be counted.'); ORS 249.865(5) ('[a]ny intentional or willful violation [of the statute] shall invalidate the prospective petition'); ORS 250.105(2) (the Secretary shall not accept initiative or referendum petition if fewer than required number of signatures are submitted). The failure of the legislature to include similar language in its description of the consequences of violating ORS 260.560 strongly suggests that it did not intend invalidation of signatures to be a remedy for violating that statute."

Id. at 393-94, 964 P.2d 284. The trial court read *Nelson* to suggest that the legislature's decision not to state expressly in ORS 249.740(4) or elsewhere that a violation of circulator certification requirements would lead to the invalidation of signatures, as the legislature had so stated in ORS 249.008(1), meant that the legislature did not intend to authorize that remedy.

Even if *Nelson* correctly construed the contrast in the statutory texts that it considered – an issue that we need not decide here – that case is distinguishable. As we have explained elsewhere, the Secretary of State has determined, in the lawful exercise of delegated authority, that a circulator's violation of certification requirements deprives the affected signature sheet of the certification that ORS

249.740(4) requires. The Secretary of State's determination advances the legislature's objective of deterring fraud in the nomination process. *Nelson* did not address the legal effect of the Secretary of State's delegated authority to reach that determination and to adopt rules and procedures to deter fraud in the election system.

Finally, the trial court noted that some counties did not comply with the Secretary of State's written instruction to scrutinize signature sheets for circulator certification problems. After those counties submitted their sheets of verified elector signatures, the Secretary of State's staff examined the signature sheets for the circulator certification problems that the counties had neglected to investigate. If the staff determined that the circulator certifications violated the Secretary of State's requirements, then staff did not count the elector signatures on the affected signature sheets. The trial court determined that "[t]here appears to be no statutory or administrative rule authority for that novel action by the Secretary at the post-verification stage" and that that action violated ORS 247.005.

The trial court acknowledged that Lindback had sought to justify that action by citing the Secretary of State's responsibility, expressed in ORS 246.110, "to obtain and maintain uniformity in the application, operation and interpretation of the election laws." We agree with Lindback's explanation. The noncompliance by several counties with the Secretary of State's written instructions, issued under the Secretary of State's express authority in ORS 246.120, threatened a violation of the uniform application of the Secretary of State's requirements for circulator certification. *See* ORS 246.120 ("A county clerk affected

thereby shall comply with the [Secretary of State's] directives and instructions.") Faced with that potential violation of uniformity, the Secretary of State's choice to engage in a post-verification review of signature sheets from noncomplying counties was a permissible one. And, for the reasons already stated, the policy statement in ORS 247.005 does not undermine the Secretary of State's authority under ORS 246.110 to make that choice.

In light of the foregoing, we conclude, that the trial court impermissibly sustained plaintiff's fourth claim for relief. Plaintiffs argue, however, that the court should not grant a writ of mandamus because each of their other claims for relief would warrant the same injunctive relief that the trial court granted. Plaintiffs assert that the record demonstrates, as a matter of law, that plaintiffs are entitled to the same relief under each of those claims. We have considered plaintiffs' alternative theories, because, if one or more were correct, it would obviate the necessity of relief in mandamus.

Plaintiffs correctly identify their burden at this point respecting their other claims for relief. ORS 18.082(3) provides:

> "Upon entry of a general judgment, any claim in the action that is not decided by the general judgment or by a previous limited judgment, that has not been incorporated into the general judgment under subsection (2) of this section, or that cannot be decided by a supplemental judgment, is dismissed with prejudice unless the judgment provides that the dismissal is without prejudice."

Under that statute, the trial court's general judgment dismissed with prejudice all claims for relief except the

fourth claim for relief that the court expressly sustained. Consequently, plaintiffs can prevail on their alternative arguments only if there is no evidence in the record to support the dismissal with prejudice of the remaining claims. We turn now to those claims.

PLAINTIFFS' ALTERNATIVE ARGUMENTS

Plaintiffs assert in their first claim for relief that the Secretary of State, in notifying Nader that his campaign had filed insufficient signatures, failed to include with the decision any findings of fact or conclusions of law to explain the reasons for that action. Plaintiffs seek review of that notification under ORS 183.484 as an order in other than a contested case.

Plaintiffs' first claim relies on a misinterpretation of an agency's responsibility in issuing an order in other than a contested case. In that context, "nothing in the APA directs an agency in other than a contested case proceeding to make a record or to make findings of fact before issuing its order." *Norden v. Water Resources Dept.*, 329 Or. 641, 647, 996 P.2d 958 (2000). Under *Norden,* an agency's failure to incorporate findings of fact or conclusions of law into an order in other than a contested case to explain the basis for the order is not a violation of any law. Consequently, plaintiffs' first claim for relief fails.

Plaintiffs' second claim for relief asserts that the Secretary of State has no authority to refuse to recognize verified elector signatures on signature sheets that contain errors committed by circulators or the Nader campaign. However, the claim rests on the same false premise that this court rejected above in discussing plaintiffs'

fourth claim for relief. For the same reasons, plaintiffs' second claim for relief is not well taken.

Plaintiffs' third claim for relief challenges the Secretary of State's rejection of signature sheets that the Nader campaign submitted without sequential numbering. Plaintiffs contend, and the Secretary of State disputes, that the Nader campaign followed the instruction of elections officials in numbering submitted signature sheets. Plaintiffs argue that the Secretary of State is estopped to deny the advice that the Nader campaign received.

ORS 249.009(1)(b) authorizes the Secretary of State to adopt rules that "[p]rescribe a system for numbering all signature sheets of * * * certificates of nomination by individual electors * * * ." The Secretary of State has exercised that authority by adopting the following rule in the SCMIE:

> "Before submitting the signature sheets to the appropriate county elections official for signature verification, the chief sponsor must * * * [w]ithin each individual county, sequentially number each signature sheet in the space provided; * * * "

Lindback explained that his office rejected the signature sheets in question because the Nader campaign had failed to number the sheets before submission to county election officials in violation of the rule.

As a general proposition, a governmental agency may be estopped from asserting a claim inconsistent with a previous position that it has taken. *Dept. of Transportation v. Hewett Professional Group,* 321 Or. 118, 126, 895 P.2d 755 (1995). However, one element required for estoppel is

reasonable reliance on a governmental actor's misstatements. Reliance on a misstatement is not reasonable if the governmental actor had no authority to make the misstatement. *Id.* The alleged misstatement on which plaintiffs rely would have had the effect of negating the administrative rule that the Secretary of State enforced. Nothing in the record demonstrates that any person who may have advised the Nader campaign had (or indeed could have) any authority to negate a rule. Thus, any reliance on that statement, if made, was not reasonable. The third claim for relief is legally flawed for that reason.

Plaintiffs' fifth, sixth, and seventh claims for relief assert various constitutional challenges, which we summarized above, to the Secretary of State's disqualification of signature sheets due to errors by circulators in signing and dating the sheets. Plaintiffs contend that a compelling justification must support the state's enforcement of any rule that results in the disqualification of the signatures of registered voters.

We do not dispute that the statutory procedure for nomination by individual electors implicates important aspects of the political liberty and associational freedom of Oregon's electors. However, plaintiffs' claim that the Secretary of State's action effectively compels them to collect thousands of signatures in addition to the number required by Oregon statute or the state constitution is illusory. Plaintiffs, like all political participants, must collect only the number of signatures, and comply with the pertinent signature gathering procedures, that Oregon law requires. Thus, contrary to plaintiffs' argument, the Secretary of State has not imposed an undue burden on

plaintiffs' political freedoms under the state or federal constitutions.[8]

The United States Supreme Court has noted, in an analogous context, that a state (there, Colorado) "retains an arsenal of safeguards" to protect the integrity of a ballot-initiative process, to deter fraud, and to diminish corruption. *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182, 204-05, 119 S.Ct. 636, 142 L.Ed.2d 599 (1999). The Court in *Buckley* specifically cited a state statute that invalidated an initiative "if [the] circulator has violated any provision of the laws governing circulation" as one example of a legitimate state safeguard. *Id.* at 205. The Court also noted that states "have considerable leeway to protect the integrity and reliability of the initiative process, as they have with respect to election processes generally," *id.* at 191, citing as an example Colorado's requirement that petition circulators attach to each petition section an affidavit containing particular factual statements.

We recognize, of course, that functional differences exist between the initiative process scrutinized in *Buckley* and the candidate nomination procedure under consideration here. But, as noted, the underlying signature collection and circulator certification procedures are analogous. For that reason, we conclude that, according to the principles discussed in *Buckley,* Oregon's circulator certification procedure, and the other procedures discussed above that protect the electoral process from fraud, withstand federal constitutional scrutiny. It follows from the foregoing that

[8] Plaintiffs present no separate argument under the state constitution in this court.

the Secretary of State's disqualification of signature sheets in this case is not unconstitutional for the reasons asserted by plaintiffs.

Plaintiffs' only remaining claim concerns attorney fees and costs. That claim affords no alternative basis for sustaining the action of the trial court.

CONCLUSION

We conclude, for the reasons stated above, that the Secretary of State is entitled to relief from the order of the trial court that required the Secretary of State "to forthwith certify the Nader nomination as an independent candidate for the 2004 general election ballot." A peremptory writ will issue forthwith requiring the trial court to withdraw that order and enter judgment in favor of the Secretary of State. We will combine the writ with this court's appellate judgment. On the court's own motion, the court waives the application of ORAP 9.25, providing for petitions for reconsideration.

Combined peremptory writ and appellate judgment to issue forthwith. ORAP 9.25, providing for petitions for reconsideration, is waived on the court's own motion. ORAP 1.20(5).

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MARION

SANDRA KUCERA, an elector of Oregon and candidate for Vice President of the United States, SARAH THERESA WINDER, KRISTEN ZUBEL, and NATALIE BOLTON, each an elector of Oregon and signor of petition for nomination of Ralph Nader for President of the United States and Sandra Kucera as Vice President of the United States and as a circulator of said nominating petition, PHILLIP SALISBURY and SAMANTHA BERG, each an elector of and signor of a petition for nomination of Ralph Nader for President of the United States and Sandra Kucera as Vice President of the United States, TIMOTHY JOHNSON, a circulator of said nominating petition who is not an elector of Oregon, GREGORY KAFOURY, an individual, an elector of Oregon and Co-Chair, Nader for President 2004 in Oregon,

Plaintiffs,

v.

BILL BRADBURY, Secretary of State,

Defendant.

Case No. 04C18259

OPINION AND ORDER

Oregon law rests considerable discretion with the Secretary of State for the administration of our election laws. ORS 246.110 provides that the Secretary is the chief elections officer of this state and that it is the Secretary's responsibility to maintain uniformity in the application, operation, and interpretation of the election laws. ORS 246.120 instructs the Secretary to prepare and distribute "detailed and comprehensive written directives" to each county clerk and to assist and instruct each county clerk on election procedures. Under ORS 246.150, the Secretary of State is also authorized to adopt written rules to facilitate and assist in maintaining a maximum degree of correctness, impartiality, and efficiency in the administration of the election laws.

However, the Secretary's discretion is not unlimited, and the rules, regulations, and written directives promulgated by the Secretary of State must be consistent with the statutes adopted by the legislative body for the conduct of elections in Oregon. And, notably, in ORS 247.005, the Oregon State Legislature has declared that "it is the policy of this state that all election laws and procedures shall be established and construed to assist the elector in the exercise of the right of franchise."

The specific issues raised in this case relate to the statutory provisions of ORS 249.740 for the Nomination of Candidates by Individual Electors, and to the rules adopted by the Secretary of State to implement that statutory procedure. As pertinent here, ORS 249.740(4) provides that the circulator of each signature sheet shall certify that the individual electors whose signatures are affixed thereon had signed the sheet in the presence of the circulator, and that the circulator believes each individual is an elector registered in the electoral district. ORS

249.740(5) then further provides that the signatures contained in each certificate of nomination made by individual electors shall be certified for genuineness by the county clerk pursuant to ORS 249.008. And ORS 249.008(1) sets forth the statutory procedures for the county clerk to follow in verifying the genuineness of the signatures of the individual electors on the signature sheets. After comparing each elector's signature on the petition with the elector's signature on the voter registration cards, the county clerk is directed to attach to the petition a certificate stating the number of signatures believed to be genuine.

In addition to these statutes, and as required by ORS 249.009, the Secretary has promulgated certain written rules specifying the format of signature sheets that must be used for nominating petitions, as well as the numbering system to be utilized. Other administrative rules have been adopted to facilitate the circulator certification and elector signature verification processes set forth in ORS 249.740(4) and (5).

Those administrative rules were adopted in accordance with ORS 246.150 and are printed in written form as the 2004 State Candidate Manual: Individual Electors as set forth in OAR 165-010-0005(5). (A copy of the Manual is attached as Exhibit 1 to the original Affidavit of John Lindback in this case.)

The Introduction to the Manual declares that the Manual is intended to provide individuals interested in filing for candidacy for partisan office by petition notice of "the procedures and regulations necessary to file for office. This Manual provides a comprehensive overview of the

candidate filing process." That process is then set forth by the administrative rule process in the body of the Manual.

On page 4, under the heading Chief Sponsor of Certificate, Step 1 specifies that the chief sponsor reviews with the petition circulators the requirements for circulating the petition. As pertinent here, the rules provide:

> "All signatures must be personally witnessed by the petition circulator and the circulator's certification must be completed and dated after all signatures have been collected; and
>
> • No additional signatures may be added to that signature sheet once the circulator has signed the certification and dated the sheet."

Step 2 specifies that before submitting the signature sheets to the appropriate county elections official for signature verification, the chief sponsor must:

- "Sort the signature sheets by county;
- Within each individual county, sequentially number each signature sheet in the space provided; and
- Submit signature sheets to the appropriate county elections offices for verification, in sufficient time for the verification process to be finished before submitting the completed nominating petition to the Elections Division."

Next, on page 5, the Manual specifies that "as soon as possible the county elections official certifies the signatures and returns the signature sheets to the chief sponsor of the certificate of nomination with the total number of valid signatures." Thereafter, "the chief sponsor files the completed nominating petition with the Elections Division" of the Secretary of State. The petition consists of

both a Certificate of Nomination by Individual Electors and "Verified signature sheets with the sufficient number of signatures."

The above general description details the process prescribed by the rule for the preparation, circulation, and verification and filing of the nomination petitions as set forth by the administrative rules of the Secretary of State. There are only a few more specific additional regulations detailing Signature Sheet Requirements, Petition Signer Requirements, Circulator Requirements, and Signature and Distribution Requirements. These are set forth on pages 12 and 13 of the Manual, and all relate back to the statutory requirements set forth in ORS 249.740 as discussed above.

Those more detailed and specific rules do provide that failure to obtain written approval before circulating the forms for the signature sheets "will result in the rejection of those sheets." Notably, however, no other similar rule authorizes the wholesale rejection of signature sheets for errors other than signature sheet format violations.

Specifically, the only additional requirements for petition circulators are two: "The circulator of the candidate nominating petition must sign the circulator's certification. . . ." And "The circulator shall complete the date when the certification is signed and shall not collect any additional signatures on that sheet after dating the certification." The rule warns that violation of these circulator requirements may result in conviction of a felony with a fine up to $100,000 and/or prison for up to five years. But, no penalty of disqualification of the signatures of electors collected is provided for in the administrative rule.

This rule and the prescribed penalty, as set forth in the Manual, is consistent with the legislative policy set forth in ORS 247.005 as noted above; "all election laws and procedures shall be established and construed to assist the elector in the exercise of the right of franchise." It is also consistent with the policy position adopted by the Secretary of State in *Nelson v. Keisling*, 155 Or App 388, 964 P2d 284 (1988) rev. den. 328 Or 246, 987 P2d 507 (1999). *Nelson* arose in a somewhat different context, but the principle is the same. Despite violations of the then-applicable circulator rules, the Secretary then took the position that the verified signatures of the electors collected by those circulators should not be invalidated.

In this case, however, the Elections Division of the Secretary has taken a very different position. Mr. Lindback testified that each circulator must sign the circulation certificate with a full signature and that each full signature on each page submitted by the circulator must be verifiable by comparison with the circulator's own voter's registration if one exists, or with some other exemplar if a voter's registration form does not exist, and that initialed signatures cannot be verified as signatures unless the voter's registration also shows only an initialed signature. No written rule, however, justifies these additional requirements, although Mr. Lindback asserts that this reflects his office's longstanding historical practice.

Mr. Lindback's testimony at the hearing was not entirely consistent with his Second Affidavit submitted in this case. That Affidavit declares that alternative exemplars are only permitted to verify the signatures of non-registered circulators. "This is a narrow exception to the longstanding rule that extraneous proof – beyond the circulator's voter registration and on other petitions in the

Secretary's possession – of a circulator's signature generally is not permitted." At the hearing, Mr. Lindback testified that his office actually attempts to verify circulators' signatures with alternative exemplars if time permits.

Mr. Lindback, both by Affidavit and by live testimony, also described another unwritten rule practiced by his office:

> "It is also a longstanding rule that initials may not be used in lieu of a signature. Of course, some people's actual signatures appear similar to initials. If the circulator's signature, as shown on the voter registration card or on another permissible exemplar, confirms that the circulator's signature simply appears like initials, then the signature is accepted. But if the exemplar shows a different signature, then the initialed petition sheet is disqualified." (Second Affidavit of Mr. Lindback.)

These unwritten rules, however longstanding, are not supported by the written administrative rules as set forth in the Manual, and they are inconsistent with ORS 247.005, as well as with the prior policy of the Elections Division as set forth above. Additionally, it was obvious from the testimony of Mr. Lindback that the Secretary's unwritten rules were not applied either uniformly or consistently in actual practice.

Mr. Lindback also testified that pursuant to his written instructions to the county clerks, as set forth in Exhibits 2 and 3 to the Affidavit of John Lindback, Director of the Elections Division, the county clerks were to screen petition

sheets for circulator signature and dating problems before verifying the electors signatures appearing thereon, and were further instructed to verify only those elector signatures submitted "on signature sheets that do not have any issues." Presumably, these written instructions, prepared in August of 2004 for the Nader signature campaign, were distributed under the authorization set forth in ORS 246.120. However, these instructions are inconsistent with both the state elections policy established by the Legislature in ORS 247.005, and with the Secretary's own written rules as set forth in the Manual, as well as with the Secretary's policy position set forth in *Nelson v. Keisling*.

Interestingly, while some counties, most notably Multnomah, complied with these new written instructions, other counties apparently did not. Then, after the non-complying counties submitted their verified elector signature certificates on the signature petitions, Mr. Lindback and his staff went through those petitions again in Salem and disqualified and removed additional signature sheets that had verified elector signatures certified by the county clerk. This was done solely because of perceived signature and dating problems with the circulators' certifications. There appears to be no statutory or administrative rule authority for that novel action by the Secretary at the post-verification stage.[1]

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[1] The only potential statutory authority for this additional disqualification procedure would seem to be ORS 249.004 which permits filing officers to verify the validity of the contents of documents filed with the officer under Chapter 249. However, "the validity of the contents of the documents" at issue here would be the verified signatures of the electors and the county clerks' certification of the total number of verified signatures. Once the electors' signatures have

(Continued on following page)

The Nader campaign eventually was informed by the Secretary of State's Election Division that they fell 218 elector signatures short of qualifying their candidate for nomination by petition.

It is not disputed by the Secretary that if the elector signature sheets that had been verified by county clerks and certified to the Secretary had not been disallowed by the Secretary, the Nader campaign would have had more than enough "Verified signature sheets with the sufficient number of signatures," as required by the administrative rules as set forth in the Manual. And many more additional signature petitions were never even processed for verification at the counties because of the Secretary's instructions in August, 2004 to scrutinize for circulator certification "issues" before verifying elector signatures on the Nader nominating petitions. Neither action was authorized by administrative rule or statute, and each was inconsistent with both the state elections policy as established by the Legislature, ORS 247.005, and with the prior policy of the Secretary of State as expressed [sic] *Nelson v. Keisling*, supra.

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been verified as valid by the county clerk, there would be no policy reason to seek to disqualify them for alleged defects in the circulator certifications that would not run afoul of ORS 247.005: "It is the policy of this state that all election laws and procedures shall be established and construed to assist the elector in the exercise of the right of the franchise." In any event, ORS 249.004 was not cited as authority for the Secretary's disqualification of the previously verified electors' signatures which had already been certified to him by the county clerks. The only purpose cited by Mr. Lindback was "to maintain uniformity and consistency in the interpretation of the elections law" in accordance with ORS 246.110. Affidavit of John Lindback at page 5.

It follows without more[2] that Plaintiffs are entitled in this Court to the relief sought in their Petition. It is unnecessary to reach Plaintiffs' additional constitutional claims as the statutory claims are dispositive in their favor. Therefore, this Court orders the Secretary to forthwith certify the Nader nomination as an independent candidate for the 2004 general election ballot.

Dated this 9th day of September, 2004.

Hon. Paul J. Lipscomb
Presiding Judge

[2] Plaintiffs also complained of the manner in which the Secretary administered the rules related to the sequential numbering requirement. That requirement, however, is specifically authorized by both statute, ORS 249.009, and by an appropriate written administrative rule, as set forth in the Manual at page 4.

IN THE SUPREME COURT OF THE STATE OF OREGON

SANDRA KUCERA, an elector of Oregon and candidate for Vice President of the United States, SARAH THERESA WINDER, KRISTEN ZUBEL, and NATALIE BOLTON, each an elector of Oregon and signor of petition for nomination of Ralph Nader for President of the United States and Sandra Kucera as Vice President of the United States and as a circulator of said nominating petition, PHILLIP SALISBURY and SAMANTHA BERG, each an elector of and signor of a petition for nomination of Ralph Nader for President of the United States and Sandra Kucera as Vice President of the United States, TIMOTHY JOHNSON, a circulator of said nominating petition who is not an elector of Oregon, GREGORY KAFOURY, an individual, an elector of Oregon and Co-Chair, Nader for President 2004 in Oregon, Plaintiffs-Adverse Parties, v.	Marion County Circuit Court No. 04C18259 SC S51756 ORDER DENYING MOTION TO STAY, AND TO RECONSIDER

BILL BRADBURY,
Secretary of State,

Defendant-Relator,

and

DEMOCRATIC PARTY
OF OREGON,
JOHN NEEL PENDER and
JAMES EDMUNSON,

Intervenors Below.

Adverse Parties' motion to stay and to reconsider is denied.

Dated this 23rd day of September 2004.

/s/ _____
WALLACE P. CARSON, JR.
CHIEF JUSTICE

c: Daniel W. Meek
Mark McDougal
Gregory Kafoury
Kaye E. McDonald
Mary Hazel Williams
Roy Pulvers
Margaret S. Olney
Hon. Paul J. Lipscomb
Hon. Bill Bradbury

125 S. Ct. 27, 159 L.Ed.2d 855, 73 USLW 3204

Supreme Court of the United States

Sandra KUCERA, et al., applicants,

v.

Bill BRADBURY, Secretary of State of Oregon, et al.

No. 04A242.

Sept. 28, 2004.

Application to stay the order of the Oregon Supreme Court pending the filing and disposition of a petition for writ of certiorari presented to Justice O'CONNOR and by her referred to the Court denied.

Justice BREYER would grant the application for stay.

ORS 249.008. Verification of signatures by county clerk; removal of signatures prohibited after submittal.

(1) Except as provided in subsection (2) of this section, before a nominating petition, minutes of an assembly of electors, or petition by individual electors is offered for filing, the county clerk of each county in which the signatures were secured shall compare the signatures of electors on the petition or minutes with the signatures of the electors on the elector registration cards. Any petition or minutes submitted for verification under this section shall contain only original signatures. The county clerk shall attach to the petition or minutes a certificate stating the number of signatures believed to be genuine. The certificate is prima facie evidence of the facts stated in it. A signature not included in the number certified to be genuine shall not be counted by the officer with whom the petition is filed. No signature in violation of the provisions of this chapter shall be counted.

(2) If the total number of signatures presented to a county clerk for verification is 15,000 or more, the county clerk may use a statistical sampling technique authorized by the Secretary of State to verify the signatures. The sample shall be drawn from at least 100 percent of the number of signatures required for nomination.

(3) After signatures of electors on a nominating petition, minutes of an assembly of electors or petition by individual electors are submitted for verification, no elector who signed the petition or minutes may remove the signature of the elector from the petition or minutes.

ORS 249.009. Exclusive form of signature sheets for petitions; numbering of signature sheets.

(1) The Secretary of State by rule shall:

(a) Design the form of nominating or recall petitions, certificates of nomination by individual electors, minutes of an assembly of electors or minor political party formation petitions; and

(b) Prescribe a system for numbering all signature sheets of nominating or recall petitions, certificates of nomination by individual electors, minutes of an assembly of electors or minor political party formation petitions.

(2) Regardless of any provision to the contrary in a county or city charter or ordinance, for the purpose of nominating city or county candidates, recalling city or county officers or forming a minor political party, an individual must use the applicable form designed under this section.

ORS 249.740. Certificates of nomination made by individual electors; statement regarding payment of petition circulators; certification of signature sheets.

(1) A certificate of nomination made by individual electors shall contain a number of signatures of electors in the electoral district equal to not less than one percent of the total votes cast in the electoral district for which the nomination is intended to be made, for all candidates for presidential electors at the last general election.

(2) Each elector signing a certificate of nomination made by individual electors shall include the residence mailing address of the elector. Except for a

certificate of nomination of candidates for electors of President and Vice President of the United States, a certificate of nomination made by individual electors shall contain the name of only one candidate.

(3) Before beginning to circulate the certificate of nomination, the chief sponsor of the certificate shall file a signed copy of the prospective certificate with the filing officer referred to in ORS 249.722. The chief sponsor of the certificate shall include with the prospective certificate a statement declaring whether one or more persons will be paid money or other valuable consideration for obtaining signatures of electors on the certificate. After the prospective certificate is filed, the chief sponsor shall notify the filing officer not later than the 10th day after the chief sponsor first has knowledge or should have had knowledge that:

(a) Any person is being paid for obtaining signatures, when the statement included with the prospective certificate declared that no such person would be paid.

(b) No person is being paid for obtaining signatures, when the statement included with the prospective certificate declared that one or more such persons would be paid.

(4) The circulator shall certify on each signature sheet that the individuals signed the sheet in the presence of the circulator and that the circulator believes each individual is an elector registered in the electoral district.

(5) The signatures contained in each certificate of nomination made by individual electors shall be certified for genuineness by the county clerk under ORS 249.008.

(6) As used in this section, "prospective certificate" means the information, except signatures and other identification of certificate signers, required to be contained in a completed certificate of nomination.

ORS 254.500. Tally of write-in votes.

(1) This section governs the tally of votes cast for persons whose names were not printed on the ballot but are written in by electors. All such write-in votes for each office on the ballot shall be tallied together, except as follows:

(a) If the total number of write-in votes for candidates for the same nomination or office equals or exceeds the number of votes cast for any candidate for the same nomination or office on the ballot who appears to have been nominated or elected, the county clerk shall tally all write-in votes cast for the office to show the total number of votes cast for each write-in candidate.

(b) If no names of candidates are printed on the ballot for an office, the county clerk shall tally the votes cast for each candidate for the office who received a vote.

(2) No person other than the county clerk, a member of a counting board or any other elections official designated by the county clerk may tally write-in votes.